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Office Supreme Court, U.S.

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ALEXANDER L. STEVAK

No.

In the Supreme Court of the United States

October Term, 1984

JOHN L. VAKAS, M.D.,
Petitioner,

vs.

PAUL RODRIQUEZ, M.D., WILLIAM C. SWISHER,
M.D., FREDERICK J. GOOD, D.C., BETTY JO McNETT,
JOAN MARSHALL, D.C., JULIA BARBEE, D.O., HER-
MAN H. JONES, JR., M.D., F. LEE DOCTOR, D.O.,
JERRY L. JUMPER, D.O., JAMES A. McCLURE, M.D.,
DON L. McKELVEY, D.C., GORDON E. MAXWELL,
M.D., HAROLD L. SAUDER, D.P.M., JAMES D. BRUNO,
M.D., RICHARD J. CUMMINGS, M.D., F. J. FARMER,
D.O., HELEN GILLES, M.D., DAN A. KELLY, M.D.,
RICHARD A. UHLIG, D.O., JAMES R. CROY, D.C., REX
A. WRIGHT, D.C., THE STATE OF KANSAS, and THE
KANSAS STATE BOARD OF HEALING ARTS,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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QUESTIONS PRESENTED

1. When the members of a state board of healing arts, purporting to act in a quasi-judicial capacity, attempt to extort a release of their personal liability for federal civil rights claims from a physician, are board members entitled to immunity from damages under 42 U.S.C. § 1983?

2. When a state agency has deprived a citizen of rights guaranteed by the fourteenth amendment and no statutory remedy against that entity for the deprivation exists, may a damage remedy be implied directly from the state-directed terms of the fourteenth amendment?

3. When actions of a state are challenged as violative of clear standards of due process of law and no state law question exists, may a federal court abstain from decision in favor of a court of the defendant state?

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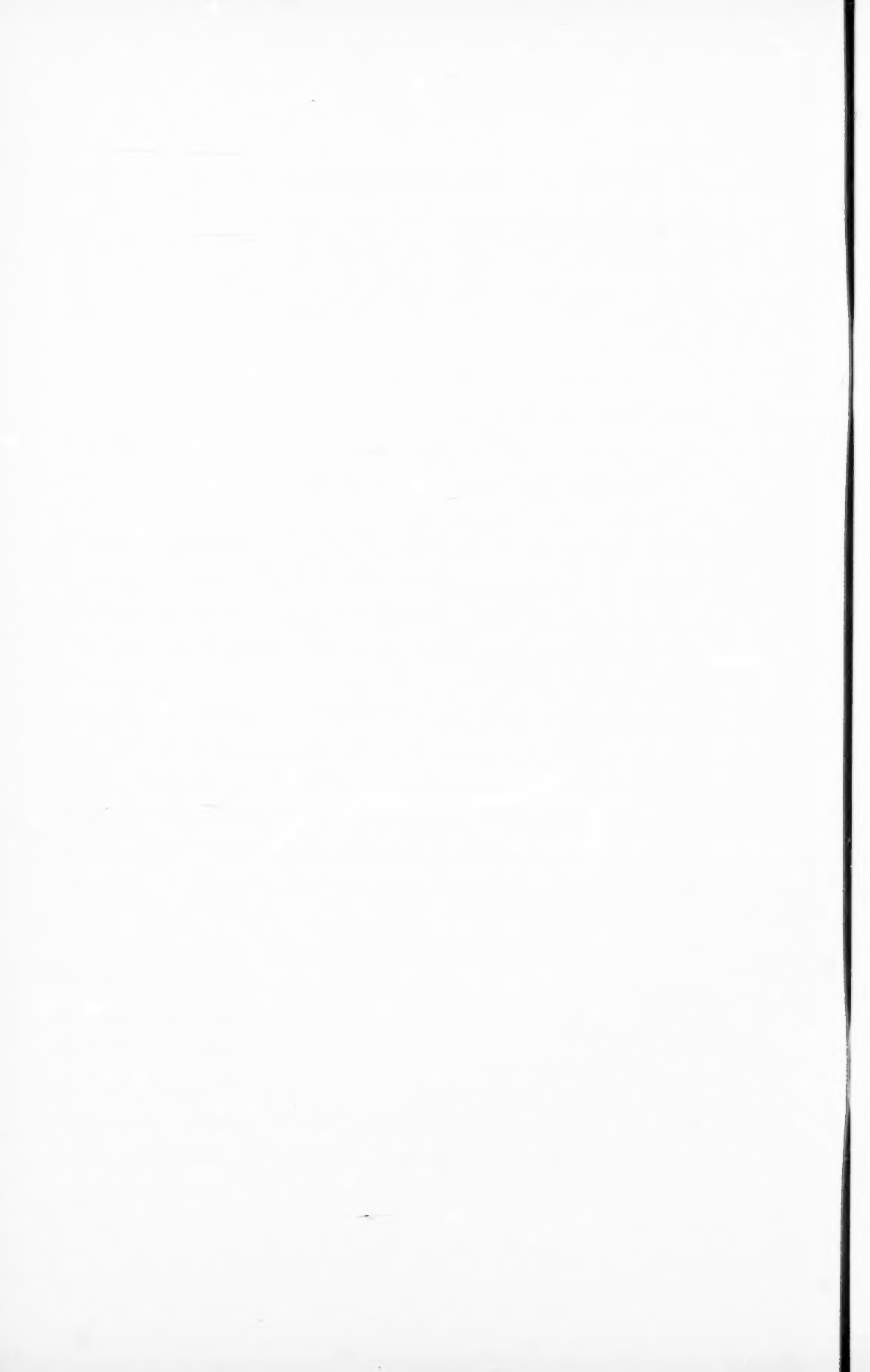
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No.

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JOHN L. VAKAS, M.D.,
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vs.

PAUL RODRIQUEZ, M.D., et al.,¹
Respondents.

**PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT**

The petitioner, John L. Vakas, M.D., respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Tenth Circuit entered in this proceeding on April 24, 1984.

1. William C. Swisher, M.D., Frederick J. Good, D.C., Betty Jo McNett, Joan Marshall, D.C., Julia Barbee, D.O., Herman H. Jones, Jr., M.D., F. Lee Doctor, D.O., Jerry L. Jumper, D.O., James A. McClure, M.D., Don L. McKelvey, D.C., Gordon E. Maxwell, M.D., Harold L. Sauder, D.P.M., James D. Bruno, M.D., Richard J. Cummings, M.D., F. J. Farmer, D.O., Helen Gilles, M.D., Dan A. Kelly, M.D., Richard A. Uhlig, D.O., James R. Croy, D.C., Rex A. Wright, D.C., individually and as members of the respondent Board, The State Of Kansas, and The Kansas State Board Of Healing Arts.

OPINIONS BELOW

The opinion of the Court of Appeals, reported at 728 F.2d 1293, appears in the appendix hereto. No written opinion was rendered by the District Court for the District of Kansas. A final state-court review of administrative proceedings appears in the appendix.

JURISDICTION

The judgment of the Court of Appeals for the Tenth Circuit was entered on April 23, 1984, affirming the District Court's order of dismissal of August 27, 1982. The Court of Appeals denied a timely petition for rehearing on April 16, 1984, and this petition for certiorari was filed within ninety days of the subsequent judgment entered on the rehearing. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

UNITED STATES CONSTITUTION, Amendment XIV:

No state shall . . . deprive any person of life, liberty, or property, without due process of law. . . .

42 U.S.C. § 1983:

Every person who, under color of any statute, ordinance, regulation, custom or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States . . . to the deprivation of any rights, privileges or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law. . . .

STATEMENT OF THE CASE

Jurisdiction of the district court was invoked under the fourteenth amendment and 42 U.S.C. § 1983, and under 28 U.S.C. §§ 1331 and 1343. Petitioner sought damages in the United States District Court for the District of Kansas for respondents' use of state law to compel him to relinquish rights and claims against respondents, thus depriving him of his right to petition the courts for a redress of grievances. Petitioner alleged that:

1. In the board's proceeding against him, the respondent intentionally violated basic tenets of due process of law.

2. Individual respondents threatened to institute further proceedings against him after admitting that the state board had no interest in doing so, merely to coerce petitioner into abandoning his federal civil rights suit.

3. The renewed proceedings against petitioner, instituted solely to extort a release of federal civil rights claims, were unfair and rendered a nullity by the intentional wrongdoing of individual respondents.

See Complaint (app., p. A11). The federal district court dismissed petitioner's complaint in its entirety; the Tenth Circuit affirmed the dismissal. The Petitioner now seeks relief in damages for the respondents' attempts to forestall his constitutional claims against them. The facts leading up to this petition follow.

Petitioner John L. Vakas is a physician practicing in Coffeyville, Kansas. Respondents are members of the Kansas State Board of Healing Arts, the Board itself, and the state. At the conclusion of a hearing on June 20, 1980, a panel of the Board found that petitioner had been negligent in prescription practices. At the panel's recom-

mendation, the Board ordered that Dr. Vakas surrender his privilege to dispense controlled substances for one year; if Dr. Vakas were not to surrender this privilege, the Board would revoke his license to practice medicine. Dr. Vakas appealed to the state district court, which vacated the Board's order of revocation.

In vacating the Board's order, the state district court found numerous violations of petitioner's constitutional rights in the Board's actions, including denial of a full and fair hearing, refusal to allow petitioner to present witnesses in his own behalf, refusal to allow closing argument, failure to state charges with reasonable definiteness, refusal to allow a continuance for just cause, and refusal to allow petitioner to contest findings of the Board's hearing panel before the Board's final decision. *Kansas State Board of Healing Arts v. Vakas*, No. 80-C-233 (Montgomery County 1981) (app., p. A20). The district court remanded to the Board for further proceedings consistent with its findings.

The Board accepted the district court's decision as a final adjudication, and, in its Journal Entry, stated that it did not desire to instigate further administrative proceedings against Dr. Vakas. See *Journal Entry*, paragraph (3) (app., p. A22). The Board, however, conditioned its decision not to instigate further proceedings against petitioner by requiring him to waive "all issues existing between the parties [as] being hereby satisfactorily resolved." *Id.* at paragraph (4). When petitioner resisted signing such a release of all claims, the Board threatened to initiate new proceedings against petitioner to coerce him into abandoning his civil remedies against the board. When petitioner did not agree to the release of claims, new proceedings against petitioner were commenced on June 18, 1982. In early 1983, charges against petitioner

were dismissed by a stipulation that was not to effect petitioner's civil rights case; this agreement was violated, as respondents raised the new stipulation before the Tenth Circuit. The stipulation was entered into after petitioner commenced his action in the United States District Court for the District of Kansas on July 16, 1982, seeking redress for the uncontested violations of his right to due process before the state licensing board and the attempted extortion of a release of his civil rights claims against the respondents.

REASONS FOR GRANTING THE WRIT

I. THE DECISION BELOW CONFLICTS WITH DECISIONS OF THIS COURT AND OTHER COURTS OF APPEALS AS TO THE IMMUNITY OF MEMBERS OF A STATE ADMINISTRATIVE BOARD UNDER 42 U.S.C. § 1983.

The court below held that the extortion of a release of claims, by and for the benefit of individual members of a state agency who had violated petitioner's rights to due process of law, was quasi-judicial conduct. The Tenth Circuit then found that the individual respondents were entitled to complete immunity from damages under 42 U.S.C. § 1983. In so holding, the court below wholly misapplied decisions of this Court, and acted in clear conflict with decisions of other Courts of Appeals. Its holding is, in reality, a finding that members of quasi-judicial entities are free to extort releases from liability for their federal civil rights violations with impunity.

The holding below immunizes conduct that is plainly unconstitutional. It is axiomatic that an individual state

officer cannot use the power of his office to extort releases and forestall aggrieved plaintiffs' civil rights actions. "What he cannot do is condition a voluntary dismissal of a charge upon a stipulation by the defendant that is designed to forestall the latter's civil case." *MacDonald v. Musick*, 425 F.2d 373, 375 (9th Cir.) *cert. denied*, 400 U.S. 852 (1970). Such releases are "void as against public policy" and "basically odious." *Boyd v. Adams*, 513 F.2d 83, 88 (7th Cir. 1975). The individual respondents' actions impinge on petitioner's first amendment right of access to the courts, which must be "freely exercisable without hindrance or fear of retaliation." *Milhouse v. Carlson*, 652 F.2d 371, 374 (3d Cir. 1981); *see also Sanders v. St. Louis County*, 724 F.2d 665, 666 (8th Cir. 1983). That right of access must be a paramount interest:

The contract for release, if viewed in this light, becomes a trade-off of a public interest for a private interest . . . if the officers' conduct was tortious, the public has no interest in denying their victims redress. If, on the other hand, the officers acted legally, they are afforded the full protection of the law and need not resort to the release for vindication.

Gray v. City of Galesburg, 71 Mich.App. 161, 247 N.W.2d 338, 340 (1976). The decision below allows an administrative agency to unilaterally foreclose access to courts for redress of grievances, even though this Court has unambiguously condemned state actions that impede court access. *See, e.g., Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 429 (1982) ("The Court traditionally has held that the Due Process Clauses protect civil litigants who seek recourse in the courts, either as defendants hoping to protect their property or as plaintiffs attempting to redress grievances"). In holding such conduct to be immune from

damage liability, the Tenth Circuit disregarded long-standing mandates of this Court and created an aberration from other circuits' opinions.

In failing to apply the correct test of immunity, the Tenth Circuit ignored the clear dictates of this Court. The Tenth Circuit mistakenly relied on *Stump v. Sparkman*, 435 U.S. 349 (1978), to erroneously determine that the individual Board members were acting in a quasi-judicial capacity. *Opinion below* (app., p. A7). The Court ignored, however, clear guidance from this Court on classification of immunities for members of a board such as respondents. Under *Supreme Court of Virginia v. Consumers Union*, 446 U.S. 719 (1980), a court must match the appropriate grant of immunity to the function under which the board operates at the time of the act. *Id.* at 734-36. The immunity established in *Sparkman* is available only to acts of a judicial character. In acting in an enforcement capacity, however, these individual respondents were entitled to only a qualified immunity. *Butz v. Economou*, 438 U.S. 478, 506 (1978); *United States v. Lee*, 106 U.S. 196, 220 (1882) ("No officer of the law may set that law at defiance with impunity"). The qualified immunity is lost when the official acts in an enforcement capacity to deprive one of a clearly established right of constitutional dimensions of which the official had reason to know. *Scheuer v. Rhodes*, 416 U.S. 232, 247-48 (1974), *Harlow v. Fitzgerald*, 457 U.S. 800, 807 (1982). This test deters unconstitutional conduct such as that practiced by the individual respondents; failure to apply the *Scheuer* standard worked an impermissible injustice against petitioner.

Completely absent from the decision below is any application of the appropriate test, which is applied in

all other circuits.² Every circuit except the Tenth applies the good-faith test in situations similar to that before this Court, in recognition that its objective standard implies a presumptive knowledge of, and respect for, "basic, unquestioned constitutional rights." *Wood v. Strickland*, 420 U.S. 308, 322 (1975). Accordingly, the Third Circuit recently found absolute immunity inappropriate to "an attorney general engaged in a quasi-judicial function." *Forsyth v. Kleindienst*, 729 F.2d 267, 272 (3d Cir. 1984). Qualified immunity was also denied; the Court of Appeals affirmed the district court's findings that the defendant did not meet the two-part test of (1) having reasonably believed his actions were not against the law without reason to know they were unlawful and (2) not having taken the action with the intention of depriving plaintiff of a federal right. *Forsyth v. Kleindienst*, 551 F. Supp. 1247, 1259 (E.D. Pa. 1983).³ The dismissal of Dr. Vakas' claims on the basis of immunity represents a departure from the accepted view in each other circuit, and creates

2. See, e.g., *Burns v. Sullivan*, 619 F.2d 99, 108 (1st Cir. 1980) (applying qualified, good-faith test to city councilor); *Green v. Maraio*, 722 F.2d 1013 (2d Cir. 1983) (applying test to court reporter); *Forsyth v. Kleindienst*, 729 F.2d 267, 272 (3d Cir. 1984); *Bever v. Gilbertson*, 724 F.2d 1083 (4th Cir. 1984) (approving test for State Department of Highways officials); *Williams v. Treen*, 671 F.2d 892, 896 (5th Cir. 1982) (applying test to state prison officials); *Bier v. Fleming*, 717 F.2d 308 (6th Cir. 1983) (applying test to State Racing Commissioner); *Crowder v. Lash*, 687 F.2d 996, 1006-07 (7th Cir. 1982) (applying the test to state prison officials); *Green v. White*, 693 F.2d 45, 47-48 (8th Cir. 1982) (applying test to State Training Center for Men); *Anderson v. Boyd*, 714 F.2d 906, 908-09 (9th Cir. 1983) (applying test to state parole board members); *Williams v. Bennett*, 689 F.2d 1370, 1385 (11th Cir. 1982) (applying test to state board-of-corrections members).

3. The *Forsyth* court found its holding to be appropriate to the quasi-judicial nature of the defendant's acts: "In situations of abuse of office, an action for damages may offer the only realistic avenue for vindication of constitutional guarantees." *Forsyth*, 551 F. Supp. at 1253, quoting *Harlow*, 457 U.S. at 814.

a conflict of both decision and principle that should be corrected.

This conclusion is made imperative by an application of either test of immunity to the facts of this case. Under the accepted standard of qualified immunity, the actions of the individual respondents are entitled to no immunity whatsoever. The threat to institute further proceedings in order to extort a release of civil rights claims could only be motivated by a purely personal attempt at self-protection. Acts performed to further a private purpose cannot be the basis of an immunity. *Beard v. Udall*, 648 F.2d 1264, 1271 (9th Cir. 1981), *Brooks v. Fitch*, 534 F. Supp. 129 (D.N.J. 1981). Indeed, this exercise of state-supported power for the personal benefit of individual respondents takes the action of respondents outside of even the immunity applied by the court below—a purely personal action is, by its nature, one in “clear absence of all jurisdiction.” *Stump v. Sparkman*, 435 U.S. 349, 357 (1978). The use of state power and process by individual board members for a wholly illegitimate purpose unauthorized by any act of the State of Kansas cannot be the basis for an immunity.⁴ Further, “it certainly violates the fourteenth amendment” to force a citizen to subject his liberty and property to the judgment of a body composed of members with “a direct, personal, substantial pecuniary interest in reaching a conclusion against him in his case.” *Tumey v. Ohio*, 273

4. Even the most cursory examination of the Board's statutory grant of authority repudiates any assertion that the individual respondents' conduct was within their jurisdiction. See *Kan. Stat. Ann.* §§ 65-2801-90 (1980 and Supp. 1984). It is beyond the pale of jurisprudential experience to even suggest that individual board members may protect their personal exposure to liability by using the power of their office to extort a release of federal civil-rights claims from a licensee whose livelihood is under their control.

U.S. 510, 523 (1927). The intentional misconduct of the individual respondents, entitled to be taken as true on a motion to dismiss petitioner's complaint,⁵ *Poller v. Columbia Broadcasting System, Inc.*, 368 U.S. 464, 473 (1962), does not deserve the protection of any common-law grant of immunity. See *Tower v. Glover*, 52 U.S.L.W. 4866 (June 25, 1984) (intentional misconduct not immune).⁶ The individual respondents' intentional misconduct in extorting a release of claims and concurrently acting as a state-empowered body to protect the pecuniary interest respondents had in obtaining such a release is entitled to no immunity whatsoever.

The conflict engendered by the Tenth Circuit's misapplication of the decisions of this Court justifies the grant of certiorari to review the judgment below.

5. As a practical matter, any decision with respect to the immunity of the individual state officials is premature where a factual record has not been developed by the trial court.

A plea of official immunity cannot be sustained until a court has knowledge of the exact nature of the defendants' actions and the precise scope of their official duties. The court can then address the legal question of whether the government's interest in the forthright performance of these duties requires that the officials be held immune from any liability based on their actions.

* * *

Since we do not have an adequate record to decide the immunity question this aspect of the suit must wait resolution by the district court after hearing.

Kletschka v. Driver, 411 F.2d 436 (2d Cir. 1969). The trial court here failed to develop a record upon which any decision concerning immunity could be based.

6. A vague and unsupportable policy of protecting state licensing officers from personal liability cannot be the basis of an immunity:

We do not have a license to establish immunities from § 1983 actions in the interests of what we judge to be sound social policy. It is for Congress to determine whether § 1983 litigation has become too burdensome to state or federal institutions, and if so, what remedial action is appropriate.

Tower v. Glover, 52 U.S.L.W. 4866, 4868 (June 25, 1984).

II. THE DECISION BELOW FAILED TO RESOLVE THE SIGNIFICANT AND OFTEN-ENCOUNTERED ISSUE OF DIRECT IMPLICATION OF A FOURTEENTH AMENDMENT REMEDY FOR VIOLATIONS OF CIVIL RIGHTS BY A STATE ENTITY IN ACCORDANCE WITH PRINCIPLES ELUCIDATED BY THIS COURT.

The holding of the Tenth Circuit perpetuates the paradoxical result of a "state" being insulated from suit under the fourteenth amendment, even though the terms of that amendment "are directed to the states . . . they have reference to actions of the political body denominated a state, by whatever instruments or in whatever modes that action may be taken." *Ex parte Virginia*, 100 U.S. 339, 346-47 (1880). A fundamental tenet of American constitutional law holds that the "very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury." *Marbury v. Madison*, 1 Cranch 137, 163 (1803). For citizens whose rights have been deprived by a state agency,⁷ however, no remedy exists under the decision below.⁸

7. The state is not considered a person for purposes of 42 U.S.C. § 1983. *Hutto v. Finney*, 437 U.S. 678 (1978).

8. This interpretation of the fourteenth amendment twists its meaning to a polar opposite of its intended place in constitutional adjudication. Under the unassailable logic of one of the signers of both the constitution and the Declaration of Independence, the state should be responsible for the consequences of its improper acts:

The perverted use of genus and species in logic, and of impressions and ideas in metaphysics, have never done mischief so extensive or so practically pernicious, as has been done by states and sovereigns, in politics and jurisprudence; in the politics and jurisprudence even of those, who wished and meant to be free. . . . Upon general principles of right shall the [state] when summoned to answer the fair demands of a creditor, be permitted, proteus-like, to assume a new appearance, and to insult him and justice, by declaring, I am a sovereign state? Surely not.

Chisholm v. Georgia, 2 Dall. 419, 454, 456 (1793) (Wilson, J.).

Several circuits allow direct remedies; several do not. The continuing confusion among the circuits and the great importance of the question to constitutional jurisprudence and the citizenry of this nation provide compelling justification for this Court to finally resolve the question of whether a direct right of action exists under the fourteenth amendment. The importance of the issue was recognized by this Court, but reserved for future decision, in *Mount Healthy City Bd. of Educ. v. Doyle*, 429 U.S. 274, 278 (1977) ("it is an extremely important question and one which should not be decided on this record").⁹ The record in the case now before the Court is, in contrast, a compelling one for a dispositive determination of whether a direct cause of action exists under the fourteenth amendment.

Determination of this issue is imperative in view of the dispositions of the case below, and in view of the contrary decisions across the circuits.¹⁰ The Tenth Circuit was not only in conflict with several circuits; its decision conflicted in principle with clear guidelines from this Court. *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971), provided

9. A direct remedy for damages under the fourteenth amendment need not be fashioned from whole cloth; this Court has allowed a direct remedy for equitable relief under the fourteenth amendment. See *Brown v. Board of Educ.*, 347 U.S. 483 (1954). By any measure of sovereign inviolability, the compulsion of a mandatory injunction is surely a deeper inroad upon the state than exposure to a mere claim for monetary relief.

10. The division of the circuits is geometrical in its divisiveness. The First, Second, Sixth, Seventh and Eighth Circuits have held that a cause of action exists directly under the fourteenth amendment for a claim against a state agency. See *Citadel Corp. v. Puerto Rican Highway Authority*, 695 F.2d 31 (1st Cir. 1983); *Ellis v. Blum*, 643 F.2d 68 (2d Cir. 1981); *Hays v. Jefferson County*, 668 F.2d 869 (6th Cir. 1982); *Winterland Concessions Co. v. Trela*, _____ F.2d _____ (7th Cir. May 17, 1984);

(Continued on following page)

guidelines for direct implication of constitutional remedies; these principles were further developed in *Davis v. Passman*, 442 U.S. 228 (1979), *Carlson v. Green*, 446 U.S. 14 (1980), *Chappel v. Wallace*, 103 S.Ct. 2362 (1983) and *Bush v. Lucas*, 103 S.Ct. 2404 (1983). The tests developed over this line of cases were ignored by the court below, which held that this Court "strictly limited" the availability of a private right of action. The court below, however, did not apply the appropriate tests to the case. *Opinion below* (app., p. A6).

Had it followed the criteria established by this Court, the court below would have been compelled to find that this case is a proper one for a direct remedy under the fourteenth amendment. This Court has held that the first issue to be addressed is whether the wrong is one for which there is no remedy. *Bivens*, 403 U.S. at 626. Because a state agency may not be sued under 42 U.S.C. § 1983, no remedy exists for Dr. Vakas. Further, it cannot be said that Congress has intended that state law provide the "equally effective" remedy for the redress of violations of federally guaranteed civil rights, cf. *Bivens*, 403 U.S. at 626, as such a remedy would depend upon the vagaries of various state constitutions and the efficacies of various state forums. The second issue to be addressed is consideration of any possible factors "counseling hesitation."

Footnote continued—

Guy v. Swift and Co., 612 F.2d 383 (8th Cir. 1980). The Third, Fourth, Fifth, Ninth and Eleventh, however, have refused to allow such a remedy. See *Black v. Bayer*, 672 F.2d 309 (3d Cir. 1982); *Faust v. South Carolina Highway Dep't*, 721 F.2d 934 (4th Cir. 1983); *Hearth, Inc. v. Department of Pub. Welfare*, 617 F.2d 381 (5th Cir. 1980); *Molina v. Richardson*, 578 F.2d 846 (9th Cir. 1978); *Williams v. Bennett*, 689 F.2d 1370 (11th Cir. 1982). With the addition of the Tenth Circuit, the scale tips against citizens aggrieved by state agency action. It is apparent that a plaintiff with a due-process claim against a state agency has more need for a Ouija board than for a set of Federal Reporters.

Id. at 626. In the case before this Court, all factors counsel swift correction rather than hesitation. It is recognized that section five of the fourteenth amendment does not imply a positive bar by its dormancy. *Adekalu v. City of New York*, 431 F. Supp. 812 (S.D.N.Y. 1977). Further, sound public policy requires that losses from constitutional wrongs at the hands of public officials be allocated among inevitable costs of government borne by all taxpayers, rather than requiring that the entirety of such losses rest on the shoulders of the innocent victim of such action. See *Owen v. City of Independence*, 445 U.S. 622 (1980). Imposition of damage liability for acts of extortion such as that suffered by petitioner would inhibit only misconduct by officials.

As both tests are met by petitioner, it is clear that this case is of the type that this Court has reaffirmed its power to correct:

This jurisdictional grant (28 U.S.C. § 1331) provides not only the authority to decide whether a cause of action is stated by a plaintiff's claim that he has been injured by a violation of the Constitution, *Bell v. Hood*, 327 U.S. 678, 684 (1946), but also the authority to choose among available judicial remedies in order to vindicate constitutional rights.

Bush, 103 S.Ct. at 2409. Rather than allow petitioner to bear his injury without a remedy,¹¹ this Court should

11. Damage from the respondents' act of extortion is clearly actionable under the fourteenth amendment and *Carey v. Piphus* 435 U.S. 247, 262 (1978); the due-process clause guarantees the "feeling of just treatment" by the government. *Anti-Fascist Comm. v. McGrath*, 341 U.S. 123, 162 (1951) (Frankfurter, J., concurring).

When a remedy is implied directly under the terms of the fourteenth amendment, the eleventh amendment is no bar to

(Continued on following page)

review the opinion below to correct the Tenth Circuit's error. The enormous circuit confusion on this significant and often-confronted issue provides full justification for this Court's review of the decision below.

III. IN AFFIRMING ABSTENTION, THE COURT BELOW ACTED IN CONFLICT WITH DECISIONS OF THIS COURT AND INCORRECTLY DECIDED THE UNSETTLED QUESTION OF ABSTENTION IN CIVIL RIGHTS CASES.

The court below dodged the full weight of the immunity issue by affirming abstention in favor of a state determination of respondents' jurisdiction:

The issue of defining the constitutional limits of the jurisdiction of the Kansas Board of Healing Arts is initially a matter for the State's determination. The

Footnote continued—

recovery of damages. The fourteenth amendment is recognized as "a constitutional Amendment whose other sections by their own terms embody limitations on state authority." *Fitzpatrick v. Bitzer*, 427 U.S. 445, 456 (1976). The ratification of the fourteenth amendment (1868) after the eleventh amendment (1798) could not be a clearer manifestation of Kansas' intent to surrender eleventh-amendment immunity for actions brought directly under the fourteenth amendment. "Such enforcement is no invasion of State sovereignty. No law can be, which the people of the States have, by the Constitution of the United States, empowered Congress to enact." *Ex parte Virginia*, 100 U.S. 339, 346 (1880). The state should be liable for its civil-rights transgressions: "I hold that this duty of protection, if it rests anywhere, rests on the state, and that if there is to be any liability visited upon anybody for failure to perform that duty, such liability should be brought home to the state." *Cong. Globe*, 42d Cong., 1st Sess. 791 (1871) (remarks of Representative Willard). The question is clearly an open one. *Edelman v. Jordan*, 415 U.S. 651, 694 n.2 (1974) (Marshall, J., dissenting). If § 5 legislation should limit immunity, *Fitzpatrick*, 427 U.S. at 456, certainly the substantive provision on which that enforcement power is based may provide a concurrent limitation on the eleventh amendment. See *Jagnandan v. Giles*, 538 F.2d 1166, 1188 (5th Cir. 1976) (Goldberg, J., concurring).

principles of comity and federalism dictate that federal courts abstain from premature entry into state judicial construction of administrative disciplinary procedures (app., pp. A7-8).

This holding ignores the proper purposes of abstention, and incorrectly resolves the difficult and unsettled question of forfeiting federal factfinding in civil rights cases in which the state is a defendant.

The court below erroneously relied on *Middlesex County Ethics Comm'n v. Garden State Bar Ass'n*, 457 U.S. 423 (1982), to determine that it should not interfere in ongoing state administrative procedures by ascertaining the constitutional limits of the respondents' authority. The court below did not, however, recognize that *Middlesex* could not conceivably apply to petitioner's damage action, which was not a part of any ongoing state administrative procedure; indeed, a damage action such as that brought by petitioner is conspicuously absent from the jurisdictional authority of the Board. See *Kan. Stat. Ann.* §§ 65-2801-90 (1980 & Supp. 1984). These sections have clearly defined the jurisdictional limits of the Board's authority. See also *Kansas State Board of Healing Arts v. Acker*, 228 Kan. 145, 149-52, 612 P.2d 610, 617 (1980). In no circumstance is the behavior of respondents in extorting a release included within the statutory grant of jurisdiction of the Board; nor is an action for damages a part of the administrative review procedure. The action for damages contained in petitioner's complaint cannot be part of any "ongoing" administrative procedure; *Middlesex* is, on its face, inapplicable.¹²

12. In fact, the "pending" nature of the administrative procedure required by *Middlesex* was emphasized by Justices White and Brennan in dissenting from the denial of certiorari

Equally inapplicable are all other branches of the abstention doctrine. Because the state has determined the limits of respondents' jurisdiction, the constitutionality of the exercise of that jurisdiction cannot turn on a construction of state law. *Cf. Railroad Comm'n v. Pullman Co.*, 312 U.S. 496 (1941) (abstention proper only when a state construction of an unclear question of state law could avoid constitutional adjudication); *Louisiana Power & Light v. City of Thibodaux*, 360 U.S. 25 (1959) (abstention proper only when state law is in a confused condition).¹³ If there is no unclear underlying issue of state law, there can be no abstention. *McNeese v. Board of Educ.*, 373 U.S. 668, 671-73 (1963); *Lindsey v. Normet*, 405 U.S. 56, 62 n.5 (1972). Abstention can never be ordered merely to force vindication of a federal claim in state court, *Wisconsin v. Constantineau*, 400 U.S. 433 (1971);

Footnote continued—

in *Etlin v. Robb*, 458 U.S. 1112, 1114 (1982). Further, each circuit to consider application of *Middlesex* abstention has emphasized that the administrative procedure must be "ongoing" or "pending." See, e.g., *Piper v. Supreme Court of New Hampshire*, 723 F.2d 110, 120 (1st Cir. 1983); *Coruzzi v. State of New Jersey*, 705 F.2d 688, 690 (3d Cir. 1983); *KVUE, Inc. v. Austin Broadcasting Corp.*, 709 F.2d 922, 928 n.15 (5th Cir. 1983); *Adacascade Watch Co., Inc. v. Cascade Resource Recovery*, 720 F.2d 897, 902 (6th Cir. 1984); *Ciotti v. County of Cook*, 712 F.2d 312, 313 (7th Cir. 1983); *Silberkleit v. Kantrowitz*, 713 F.2d 433, 435 (9th Cir. 1983); *Baggett v. Department of Professional Regulation*, 717 F.2d 521, 524 (11th Cir. 1983); *Family Div. Trial Lawyers v. Moultrie*, 725 F.2d 695, 701 (D.C. Cir. 1984). Only the Tenth Circuit has held otherwise. The bare fact that a state is a party to a proceeding is not sufficient to make abstention appropriate. *Moore v. Sims*, 442 U.S. 415, 423 n.8 (1979). In holding that it was, the court below conflicted with other circuits, as well as with the controlling decisions of this Court.

13. Neither is this a case in which statutory appeal from an agency determination is an integral part of a regulatory scheme. *Cf. Alabama Pub. Serv. Comm'n v. Southern Ry.*, 341 U.S. 341 (1951); *Burford v. Sun Oil*, 319 U.S. 315 (1943). The limited power of a state district court in reviewing the board's actions does not include any action for damages. See *Kan. Stat. Ann.* § 65-2848.

to do so "would amount to shirking the solemn responsibility of the federal courts to 'guard, enforce and protect every right granted or secured by the Constitution of the United States.'" *Kusper v. Pontikes*, 414 U.S. 51, 55 (1973), quoting *Robb v. Connolly*, 111 U.S. 624, 637 (1884).

This principle applies with even greater force in actions under 42 U.S.C. § 1983, which was meant to impose the federal courts between the state and its citizens as a guardian of federally secured rights. *Mitchum v. Foster*, 407 U.S. 225 (1972). The Civil Rights Act mandates federal factfinding; when facts are in dispute, a federal court must not abstain. *Conover v. Montemuro*, 477 F.2d 1073 (3d Cir., 1973) *J.P. v. DeSanti*, 653 F.2d 1080 (6th Cir. 1981). A preference for federal factfinding over state factfinding is a recurring theme in the legislative history of § 1983;¹⁴ hence, there is unequivocally no requirement that a litigant exhaust state remedies before filing in fed-

14. "The question now is, what and where is the remedy? I believe the true remedy lies chiefly in the United States district and circuit courts." *Cong. Globe*, 42d Cong., 1st Sess. 653 (1871) (remarks of Senator Osborne). The reason behind this reliance is clear:

The United States courts are further above mere local influence than the county courts; their judges can act with more independence, cannot be put under terror, as local judges can; their sympathies are not so nearly identified with those of the vicinage. . . . We believe that we can trust our United States courts, and we propose to do so.

Cong. Globe, 42d Cong., 1st Sess. 460 (1871) (remarks of Rep. Coburn). Section 1983, in fact, was enacted to provide just such a federal forum. "It is abundantly clear that one reason the legislation was passed was to afford a federal right in federal courts. . . ." *Monroe v. Pape*, 365 U.S. 167, 180 (1961). "Assessing the state of affairs as a whole, Congress specifically made a determination that federal oversight of constitutional determinations through the federal courts was necessary to ensure the effective enforcement of constitutional rights." *Allen v. McCurry*, 449 U.S. 90, 109-10 (1980) (Blackmun, J., dissenting) (federal courts are "primary and final arbiters of constitutional rights"). See also *McNeese v. Board of Educ.*, 373 U.S. 668 (1963); *Zwickler v. Koota*, 389 U.S. 241 (1967).

eral court. *Patsy v. Board of Regents*, 457 U.S. 496 (1982). Requiring a civil rights plaintiff, such as Dr. Vakas, to litigate a federal constitutional claim solely in state court imposes just such an impermissible requirement, and cannot be countenanced in any system of civil rights jurisprudence.

The Tenth Circuit's departure from accepted views of other Circuits and rejection of clear mandates from this Court, as well as the recurrent importance of the issue of abstention in civil rights cases, justifies the grant of certiorari to review the judgment below.

CONCLUSION

For all the foregoing reasons, a writ of certiorari should issue to review the judgment and opinion of the Tenth Circuit Court of Appeals.

Respectfully submitted,

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APPENDIX ITEM #1

(Filed March 7, 1984)

**UNITED STATES COURT OF APPEALS
TENTH CIRCUIT**

Nos. 82-2195

82-2476

JOHN L. VAKAS, M.D.,

Plaintiff/Appellant; Plaintiff/Cross-Appellee,

vs.

PAUL RODRIQUEZ, M.D., WILLIAM C. SWISHER, M.D.,
FREDERICK J. GOOD, D.C., BETTY JO McNETT, JOAN
MARSHALL, D.C., JULIA BARBEE, D.O., HERMAN H.
JONES, JR., M.D., F. LEE DOCTOR, D.O., JERRY L.
JUMPER, D.O., JAMES A. McCLURE, M.D., DON L.
McKELVEY, D.C., GORDON E. MAXWELL, M.D.,
HAROLD L. SAUDER, D.P.M., JAMES D. BRUNO, M.D.,
RICHARD J. CUMMINGS, M.D., F.J. FARMER, D.O.,
HELEN GILLES, M.D., DAN A. KELLY, M.D., RICHARD
A. UHLIG, D.O., JAMES R. CROY, D.C., REX A. WRIGHT,
D.C., THE STATE OF KANSAS, and THE KANSAS
STATE BOARD OF HEALING ARTS,

Defendants/Appellees; Defendants/Cross-Appellants.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS
(D.C. CIVIL ACTION No. 82-1589)

Larry W. Wall (Gerrit H. Wormhoudt with him on the
brief), Fleeson, Gooing, Coulson & Kitch, Wichita,
Kansas, for John L. Vakas, M.D.

Leslie A. Kulick, Assistant Attorney General (Robert T. Stephan, Attorney General, Bruce E. Miller, Deputy Attorney General, Topeka, Kansas, for The State of Kansas, and Wallace M. Buck, Jr., Topeka, Kansas, for Kansas State Board of Healing Arts and Individual Members of Kansas State Board of Healing Arts, with her on the brief).

Before BARRETT and LOGAN, Circuit Judges, and BOHANON, Senior District Judge*

BOHANON, District Judge

Responding to a letter of complaint from six Coffeyville, Kansas, pharmacists, the Kansas Board of Healing Arts conducted a hearing on February 23, 1980, into certain prescription practices of Dr. John L. Vakas. At the conclusion of the hearing, a stipulation was offered to Dr. Vakas in which he would relinquish his Drug Enforcement Administration (D.E.A.) registration for one year. Dr. Vakas chose not to sign the stipulation.

The Kansas Board of Healing Arts then convened a disciplinary panel of six members which conducted a disciplinary hearing on June 20 and 21, 1981. The disciplinary panel found that Dr. Vakas used poor judgment in the over-prescribing of controlled substances. As a corrective measure the panel recommended that Dr. Vakas' license to practice medicine be revoked but that the revocation be stayed should he relinquish his D.E.A. registration for a period of one year.

Dr. Vakas appealed this decision of the Board of Healing Arts to the District Court of Montgomery County,

*Honorable Luther Bohanon, Northern, Eastern and Western Districts of Oklahoma, sitting by designation.

Kansas. The state court ordered a new hearing to be conducted based upon a findings of procedural due process violations.

Shortly after the state court determination, the Kansas Board of Healing Arts offered to settle and dismiss the remanded action and submitted the following language in a proposed journal entry.

"That the parties hereto mutually agree that any and all differences having existed between the parties are now resolved to the satisfaction of both parties. Any and all issues existing between the parties be hereby satisfactorily resolved."

The proposed journal entry sparked numerous exchanges of letters between the legal counsel for the parties. In sum, the plaintiff rejected the proposed settlement as an attempt by the Kansas Board of Healing Arts to escape liability for unspecified civil causes of action. This conclusion was formed by Dr. Vakas despite repeated assurances by the Board that all that was intended was a resolution of the proceedings before the Board of Healing Arts.

Due to the failure to amicably resolve the parties' differences, the Board scheduled a disciplinary proceedings rehearing date of August 21, 1982.

To prevent the scheduled rehearing, Dr. Vakas instituted this federal action seeking an injunction of the proceedings. He additionally sought damages for alleged constitutional breaches by the Board and its individual members. In response to the federal action the Board voluntarily stayed the scheduled disciplinary rehearing and filed a motion to dismiss.

On August 27, 1982, the United States District Court conducted a hearing on the Board's motion. After oral

argument the court granted the motion to dismiss in its entirety. The court foundationed its decision on the legal principles of abstentionism and immunity. Relying heavily on *Middlesex County Ethics Committee v. Garden State Bar Assoc.*, 457 U.S. 423 (1982), the court recognized the general reluctance of the federal courts to intervene in state disciplinary proceedings under the guise of constitutional review.

Dr. Vakas now appeals the district court's dismissal and alleges as a matter of law that the trial court erroneously resolved two legal issues. He alleges that there exists a private cause of action arising directly under the auspices of the Fourteenth Amendment separate from formal congressional action. Secondly, he alleges that the Board and its members acted beyond the scope of their authority in violating his constitutional rights by committing procedural errors in his original disciplinary hearing and hence cannot claim immunity.

Appellant Vakas also attempts to raise the issue of improper action on the part of the Board and its members in their offer to settle the dispute through the language of the proposed journal entry. However, this issue is not properly raised in a federal proceeding. As the trial court correctly recognized, this issue is but an attempt to seek federal intervention in the state disciplinary process. See *Middlesex County Ethics Committee v. Garden State Bar Assoc.*, *supra*. There is simply no justification for this court to intervene in this manner. This is especially true upon review of the history of this litigation. It is apparent from the actions of the Kansas District Court that the safeguards of the United States Constitution were meticulously afforded Dr. Vakas in his earlier appeal of the Board's disciplinary hearing.

Additional issues that the appellant attempts to raise on appeal deal with the denial of injunctive relief. While these issues are also likely foreclosed by the *Middlesex* abstentionism doctrine, they need not be considered by this court. In early 1983 the parties entered into a stipulation and dismissal of the pending disciplinary action. The stipulation was substantially identical to the earlier offer of settlement by the Board. By virtue of this settlement and dismissal no case or controversy now exists on which to base legal objections to the trial court's refusal to enjoin future disciplinary action. These issues are mooted by the agreed stipulation and dismissal, and appellate review is unwarranted. See *Hall v. Beals*, 396 U.S. 45 (1969).

An additional issue now on appeal is raised through a cross-appeal by the State of Kansas, the Board of Healing Arts, and the Board members in their individual capacities. The cross-appellants claim that the trial court abused its discretion in denying them attorney fees after a favorable resolution of their motion to dismiss.

I. Private Right of Action

Appellant concedes that his claim pursuant to 42 U.S.C. §1983 against the State of Kansas is barred by the Eleventh Amendment to the United States Constitution. See *Alabama v. Pugh*, 438 U.S. 781 (1978); *Hutto v. Finney*, 437 U.S. 678 (1978); *Mt. Healthy City School Bd. of Ed. v. Doyle*, 429 U.S. 274 (1977). However, appellant seeks to have the court fashion a remedy solely from the guarantees of the Fourteenth Amendment. He cites the case of *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971) as providing the guidance for the fashioning of such a remedy.

The concept of a private right of action has been strictly limited by the United States Supreme Court in the cases of *Bush v. Lucas*, U.S., 103 S.Ct. 2404 (1983); and *Chappell v. Wallace*, U.S., 103 S.Ct. 2362 (1983). In both *Bush* and *Chappell* the Court refused to form a private right of action for federal employees and cautioned against judicial action in expanding available remedies absent congressional mandate.

An additional compelling justification for court refusal to fashion a private remedy under the Fourteenth Amendment in cases against states and their agencies are the provisions of the Eleventh Amendment. Express waiver of the Eleventh Amendment by congressional action is required under the enforcement mechanism of the Fourteenth Amendment. *Quern v. Jordan*, 440 U.S. 332 (1979); *Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976). Where, as here, the Congress has chosen not to enact an enforcement scheme *directly* addressing the appellant's situation, the state retains its sovereign immunity.

This appeal is similar to that contained in *Paul v. Davis*, 424 U.S. 693 (1976). As in *Paul*, Dr. Vakas "apparently believes that the Fourteenth Amendment's Due Process Clause should *ex proprio vigore* extend to him a right to be free of injury wherever the State may be [allegedly] characterized as a tortfeasor." 424 U.S. at 701. As the Supreme Court explained in *Paul*, there is simply no legal basis to support such an all pervasive view of the Fourteenth Amendment.

II. Immunity of the Board

In addition to a private cause of action against the State of Kansas, appellant seeks to maintain an action against the Board and its individual members for alleged breaches of his constitutional rights. The gravamen of

this complaint is the state district court's finding of procedural due process violations during the original disciplinary hearing. However, it is well established that members of administrative boards who perform judicial functions are immune from damages in a 42 U.S.C. §1983 action when acting in their judicial capacities. *Butz v. Economou*, 438 U.S. 478 (1978). Here, the Board of Healing Arts is specifically delegated such a quasi-judicial role by statute. K.S.A. 65-2801, et seq. Therefore, the issue before the trial court and on appeal is whether, as a matter of law, the Board was acting in their quasi-judicial capacity.

A facial review of the applicable statutes indicates that investigations and decisions whether to commence disciplinary proceedings are within the quasi-judicial jurisdiction of the Board. Therefore, at least facially, the Board's actions comport with their jurisdictional authority.

The standard to apply in determining whether error committed by quasi-judicial officers in the course of their duties is immune from civil action is found in *Stump v. Sparkman*, 435 U.S. 349 (1978). The general standard is strict and holds that immunity is absolute unless there is a "clear absence of all jurisdiction." 435 U.S. at 357. There is no evidence that the hearings conducted by the Board were beyond their jurisdiction. The trial court properly applied the legal doctrine of immunity in this situation.

As stated before, the appellant's allegations of actions allegedly undertaken by the Board outside their role as quasi-judicial officers are not matters properly before this court. The issue of defining the constitutional limits of the jurisdiction of the Kansas Board of Healing Arts is initially a matter for the State's determination. The

principles of comity and federalism dictate that federal courts abstain from premature entry into state judicial construction of administrative disciplinary procedures. *Middlesex*, *supra*.

III. Attorney Fees

In their cross-appeal, the State defendants contend the district court erred in refusing to award attorney fees pursuant to 42 U.S.C. §1988. They recognize that as a prevailing defendant they may be awarded attorney fees only if appellant's underlying claim was "frivolous, unreasonable, or groundless." *Roadway Express Inc. v. Piper*, 447 U.S. 752 (1980); *Prochaska v. Marcoux*, 632 F.2d 848 (10th Cir. 1980). However, they contend such a finding was made by the court by implication. Although the trial court never made the explicit finding that the plaintiff's action was frivolous, the court made the following comment during the hearing on the motion to dismiss:

"I can only say that when I came out on the bench, certainly without any preconceived thoughts as to what I would do, but because I thought I understood the state of the law at that time, I did remind the plaintiff that I had read *Middlesex*. I would say to you . . . that as of that point in time I'm not so sure the plaintiffs have read *Middlesex* as it relates to what I then said. But *Middlesex* simply says that the policies underlying *Younger v. Harris* are such that I should abstain."

Citing this statement by the court and recognizing the duty of a plaintiff to make a reasonable investigation of the legal basis of an action in order to prevent the filing of frivolous claims, *see Nelson v. Miller*, 227 Kan. 271, 607 P.2d 438 (1980), the cross-appellants argue that any find-

ing other than that the plaintiff's case was "frivolous, unreasonable, or groundless" is error.

However, upon a full review of the record in this action, this court cannot make the observation that the plaintiff's case was *necessarily* frivolous or unfounded. Although the plaintiff was confronted with substantial opposing authority, the areas of constitutional law which he sought to explore were not without some slight legal support. While this court might personally make a different finding given the history of the case, we cannot conclude that the trial court abused its discretion.

Accordingly, the trial court's findings were proper in every respect and they are hereby

AFFIRMED.

(Filed April 24, 1984)

MARCH TERM - April 16, 1984

Before Honorable James E. Barrett, Honorable James K.
Logan, Circuit Judges, and Honorable Luther Bohanon,
District Judge*.

Nos. 82-2195
82-2476

JOHN L. VAKAS, M.D.,
Plaintiff-Appellant,
Cross-Appellee,

vs.

PAUL RODRIQUEZ, M.D., et al.,
Defendants-Appellees,
Cross-Appellants.

This matter comes on for consideration of the petition
for rehearing filed by plaintiff-appellant, cross-appellee,
John L. Vakas, M.D.

Upon consideration whereof, the petition for rehearing
is denied.

/s/ Howard K. Phillips
Howard K. Phillips
Clerk

APPENDIX ITEM #2

(Filed July 16, 1982)

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS**

Civil Action No.

JOHN L. VAKAS, M.D.

Plaintiff,

vs.

**PAUL RODRIQUEZ, M.D., WILLIAM C. SWISHER, M.D.,
FREDERICK J. GOOD, D.C., BETTY JO McNETT, JOAN
MARSHALL, D.C., JULIA BARBEE, D.O., HERMAN H.
JONES, JR., M.D., F. LEE DOCTOR, D.O., JERRY L.
JUMPER, D.O., JAMES A. McCLURE, M.D., DON L.
McKELVEY, D.C., GORDON E. MAXWELL, M.D.,
HAROLD J. SAUDER, D.P.M., JAMES D. BRUNO, M.D.,
RICHARD J. CUMMINGS, M.D., F. J. FARMER, D.O.,
HELEN GILLES, M.D., DAN A. KELLY, M.D., RICHARD
A. UHLIG, D.O., AMES R. CROY, D.C., REX A. WRIGHT,
D.C., THE STATE OF KANSAS, and THE KANSAS
STATE BOARD OF HEALING ARTS,**

Defendants.

COMPLAINT

COMES NOW John L. Vakas, M.D., plaintiff, and
alleges as follows:

1. Plaintiff is an individual licensed to practice
medicine in the State of Kansas.

2. At all times pertinent to the facts and events hereinafter alleged, the individual defendants were members of the defendant Kansas State Board of Healing Arts.

3. At all times pertinent to the facts and events hereinafter alleged, the defendant Kansas State Board of Healing Arts was an agency and instrumentality of the defendant State of Kansas.

4. At all times pertinent to the facts and events hereinafter alleged, the defendants were acting under color of K.S.A. 65-2801, *et seq.*, and other laws, customs and usages of the State of Kansas, to deprive plaintiff of the rights, privileges and immunities secured to him by the Constitution and Laws of the United States, all as more particularly stated herein.

5. This action arises under 42 USCS 1983 and the Fourteenth Amendment to the Constitution of the United States, and this Court has jurisdiction of the action under 28 USCS §1331, and 1343.

FIRST CLAIM FOR RELIEF

6. On or about May 5, 1980, the defendant Kansas State Board of Healing Arts filed a Petition for Revocation Suspension, or Limitation of License against plaintiff.

7. Beginning shortly after May 5, 1980, and continuing until the present, the defendants continuously and repeatedly took actions which deprived plaintiff of his right not to be deprived of property without due process of law, and his right to equal protection of law, including his right to a full and fair hearing as guaranteed by the Fourteenth Amendment to the Constitution of the United States.

8. In particular, defendants violated the rights of plaintiff by failing to state the charges against him with reasonable definiteness, by refusing to make even a good faith attempt to cooperate with plaintiff's attempts to ascertain the factual basis for the charges against him, by refusing plaintiff a full opportunity to present arguments, by refusing to grant plaintiff adequate time to prepare a defense to the charges, by refusing to permit plaintiff to cross-examine certain witnesses and explore matters bearing directly upon the issues of the proceedings, and by refusing plaintiff's request for specific findings of fact.

9. In performing the acts described above, the defendants were conspirators engaged in a scheme and conspiracy designed and intended to deny and deprive plaintiff of rights guaranteed to him under the Constitution and laws of the United States and particularly those hereinabove enumerated.

10. The above-described acts of defendants were outrageous, arbitrary, capricious, abusive, oppressive, unreasonable, and intentional.

11. As a direct consequence and result of the above-described conduct of defendants, plaintiff has suffered and continues to suffer serious and debilitating anxiety and emotional distress, and has suffered damages in an amount in excess of \$10,000.00.

12. Defendants, by virtue of their repeated, continuous and reckless disregard of plaintiff's rights, have demonstrated a malicious desire and intentions to injure plaintiff, and on account of such malicious behavior, plaintiff is entitled to punitive damages in an amount in excess of \$10,000.00.

WHEREFORE, plaintiff prays for judgment against the defendants, jointly and severally in an amount in excess

of Ten Thousand Dollars (\$10,000.00); for punitive damages in an amount in excess of Ten Thousand Dollars (\$10,000.00); and for costs and attorneys' fees herein.

SECOND CLAIM FOR RELIEF

13. On or about August 10, 1980, plaintiff appealed a decision of the Board of Healing Arts revoking his license to practice medicine in the State of Kansas for one year to the Fourteenth Judicial Court, Montgomery County, Kansas.

14. After considering the arguments and briefs of the parties, on October 21, 1981, Judge Floyd V. Palmer vacated the decision of the Board and found that plaintiff's rights had been violated in the following respects:

1. Dr. Vakas was denied a full and fair hearing in accordance with minimal due process of law as guaranteed by the 5th and 14th Amendments to the U.S. Constitution and similar provisions of the Constitution of the State of Kansas.

2. The charges were not stated with reasonable definiteness. K.S.A. 65-2841, *Morgan v. United States*, 304 U.S. 1, 82 L.Ed. 1129; *Simmons v. United States*, 348 U.S. 397, 405, 99 L.Ed. 453; *Adams v. Marshall*, 212 Kan. 595; *Rydd v. State Board of Health*, 202 Kan. 721.

3. The denial of Licensee's request for a continuance on and before June 20, 1980 for good cause shown was a prejudicial abuse of discretion contributing to the denial of Licensee's due process rights.

4. The Board further deprived the Licensee of due process of law by denying him the right to produce witnesses in his own behalf and by refusing to allow

his attorney to present closing argument. *Adams v. Marshall*, 212 Kan. 595; *Winkelman v. Allen*, 214 Kan. 22.

5. As brought out in oral argument, the Hearing Panel did not submit a copy of its findings and recommendations to the Licensee prior to the meeting of the Board to reach its decision in reliance thereon and the Licensee was not given the chance to appear before the Board and contest those findings and recommendations prior to the final decision of the Board, all contrary to mandatory procedure and therefore the order cannot stand.

15. The decision of Judge Palmer is now a final and binding judgment which has not been appealed by the defendants.

16. Following the decision of Judge Palmer, the Board informed plaintiff that it wished to have its investigator talk with plaintiff and various pharmacists in the Coffeyville area to determine if plaintiff had been prescribing medication in a manner acceptable to the Board, and further indicated that it would refrain from further proceedings against the plaintiff if Mr. McGuire's investigation was favorable to plaintiff.

17. On or about the 22nd day of March, 1982, Mr. McGuire presented to the Board a report in which he stated that

After investigation and interview with Dr. Vakas, it would appear that Dr. Vakas's practice of writing scripts has changed since the petition was filed and is not of the type that the Board was concerned about when charges were filed against Dr. Vakas at least it appears as such at the present time.

18. On or about the 28th day of April, 1982, the plaintiff was informed that the Board had concluded that there was no reason to continue the proceedings against plaintiff.

19. On or about April 28, 1982, the Board forwarded to plaintiff a Journal Entry of Judgment which, if executed by plaintiff, would have released defendants from all liability arising from their violation of the rights of plaintiff.

20. When plaintiff refused to execute a Journal Entry containing a release of claims, and requested that a Journal Entry reflecting only the decision of Judge Palmer be entered, the Board informed plaintiff that, notwithstanding its earlier decision that further proceedings against plaintiff were unnecessary, if plaintiff would not execute a Journal Entry containing a release, the Board would retry him on the original charges.

21. Plaintiff refused to execute the Board's Journal Entry and, on or about July 12, 1982, plaintiff was served with a Petition pursuant to which the Board seeks to retry Plaintiff on the original charges.

22. By threatening to institute further proceedings against plaintiff if he did not agree to release defendants from civil liability for their wrongful acts, defendants intentionally, maliciously, arbitrarily, capriciously, and improperly utilized state law and power for illegitimate and wholly personal purposes and in an abusive and coercive manner designed to chill plaintiff's right and privilege to seek the assistance of the courts to redress obvious violations of rights secured to him.

23. On account of the foregoing abuse of state power, plaintiff has suffered severe emotional distress and anxi-

ety, and has been damaged in an amount in excess of \$10,000.

24. Throughout the proceedings against plaintiff, and notwithstanding the protests of plaintiff, defendants have demonstrated a continuing pattern of reckless and malicious disregard of the rights of plaintiff, and on account of such behavior plaintiff is entitled to punitive damages in an amount in excess of \$10,000.

WHEREFORE, plaintiff prays for judgment against the defendants, jointly, and severally, for damages in an amount in excess of Ten Thousand Dollars (\$10,000); for punitive damages in an amount in excess of Ten Thousand Dollars (\$10,000); for his costs and attorney's fees herein.

THIRD CLAIM FOR RELIEF

25. The new Petition filed against plaintiff by the Board again fails to state the charges against plaintiff with reasonable definiteness.

26. At least three years have passed since the occurrence of the still unspecified acts giving rise to the charges against plaintiff, and during such period important witnesses have disappeared and memories have deteriorated to the point that plaintiff will be denied the right to a fair hearing.

27. The lengthy and prejudicial period of time that has transpired since the occurrence of the allegedly wrongful acts of plaintiff is a direct result of the wrongful behavior of the defendants.

28. By instituting further proceedings against plaintiff, defendants are intentionally, arbitrarily, capriciously, maliciously, and improperly using state law and power

for illegitimate and wholly personal purposes and in an abusive and coercive manner intentionally designed to chill plaintiff's right and privilege to seek the assistance of the courts to redress obvious violations of rights secured to him.

29. On account of the foregoing, it is and will be impossible for plaintiff to obtain a fair and impartial hearing from defendants, and defendants therefore should be permanently enjoined from retrying plaintiff on the original charges against him.

WHEREFORE, plaintiff prays for judgment temporarily and permanently enjoining defendants from conducting a rehearing of the charges originally filed against him; and for his costs and attorney's fees herein.

FOURTH CLAIM FOR RELIEF

30. On account of wrongful behavior of defendants, the original proceedings before the Board have been rendered a nullity.

31. The new proceedings instituted by the Board to retry plaintiff will necessarily force plaintiff to duplicate the sizeable costs and attorney's fees he incurred in connection with the original proceedings.

32. Such duplication of costs and fees will be a direct result of the wrongful behavior of defendants during the prior hearing.

33. On account of the foregoing, plaintiff should be awarded judgment in an amount in excess of \$10,000 for all costs and fees incurred by him in connection with the original proceedings before the Board.

WHEREFORE, plaintiff prays for judgment against defendants, jointly and severally, in an amount in excess

of Ten Thousand Dollars (\$10,000), and for his costs and attorney's fees herein.

Fleeson, Gooing, Coulson & Kitch
Suite 1600, 125 North Market
Wichita, Kansas 67202
316/267-7361

By Larry W. Wall
Attorneys for Plaintiff

APPENDIX ITEM #3

Floyd Van Palmer
Associate District Judge
Fourteenth Judicial District
Montgomery County, Kansas
P. O. Box 768 Independence, Kansas 67301
Phone (316) 331-1261

October 20, 1981

Mr. Wallace M. Buck, Jr.
Kansas Board of Healing Arts
503 Kansas Ave., Suite 500
Topeka, Kansas 66603

Mr. Larry Wall
Fleeson, Gooing, Coulson & Kitch
P.O. Box 997
Wichita, Kansas 67201

Re: Board of Healing Arts vs John L. Vakas, M.D.
Case No. C-233 I

Gentlemen:

The Court has reached the following decision in the captioned case:

The order of the Board of Healing Arts revoking the license of Dr. John L. Vakas should be and hereby is set aside and vacated. This ruling is made on the following grounds:

1. Dr. Vakas was denied a full and fair hearing in accordance with minimal due process of law as guaranteed by the 5th and 14th Amendments to the U.S. Constitution and similar provisions of the Constitution of the State of Kansas.

2. The charges were not stated with reasonable definiteness. KSA 65-2841, *Morgan v. United States*, 304 U.S. 1, 82 L.Ed. 1129; *Simmons v. United States*, 348 U.S. 397, 405, 99 L. Ed. 453; *Adams v. Marshall*, 212 Kan. 595; *Rydd v. State Board of Health*, 202 Kan. 721.

3. The denial of Licensee's request for a continuance on and before June 20, 1980 for good cause shown was a prejudicial abuse of discretion contributing to the denial of Licensee's due process rights.

4. The Board further deprived the Licensee of due process of law by denying him the right to produce witnesses in his own behalf and by refusing to allow his attorney to present closing argument. *Adams v. Marshall*, 212 Kan. 595; *Winkelman v. Allen*, 214 Kan. 22.

5. As brought out in oral argument, the Hearing Panel did not submit a copy of its findings and recommendations to the Licensee prior to the meeting of the Board to reach its decision in reliance thereon and the Licensee was not given the chance to appear before the Board and contest those findings and recommendations prior to the final decision of the Board, all contrary to mandatory procedure and therefore the order cannot stand.

Mr. Wall will prepare findings of fact and conclusions of law consistent with the foregoing and a Journal Entry setting aside the order of the Board entered herein.

Very truly yours,

/s/ Floyd V. Palmer

Floyd V. Palmer

Associate District Judge

FVP:eff

APPENDIX ITEM #4

**IN THE DISTRICT COURT OF
MONTGOMERY COUNTY, KANSAS**

Case # 80 C 233

**KANSAS STATE BOARD OF HEALING ARTS,
Plaintiff/Appellee**

vs.

**JOHN L. VAKAS, M.D.
Defendant/Appellant.**

JOURNAL ENTRY

On this 28th day of April, 1982, the above matter comes on for hearing. Plaintiff/Appellee appears by and through its attorney Wallace M. Buck, Jr., and the Defendant/Appellant appears by and through his attorney, Larry W. Wall, and there are no other appearances.

The Court being advised in premises, finds:

(1) That by memorandum opinion and letter of October 20, 1981, the Honorable Judge Floyd Van Palmer rendered his opinion herein; that a copy of said letter opinion is attached hereto and made a part hereof in its entirety by reference as though fully set out herein;

(2) That said memorandum opinion of Judge Palmer sets out his findings of fact and conclusion of law as found to be applicable in these proceedings;

(3) That the parties are desirous of concluding these proceedings by accepting Judge Palmer's decision

and not requesting that either his decision be appealed or that the matter be remanded for an additional administrative hearing, the parties mutually agreeing that it is in the best interests of both parties, for reasons as they have discussed, to conclude these proceedings in this fashion;

(4) That the parties herein mutually agree that any and all differences having existed between the parties are now resolved to the satisfaction of both parties; any and all issues existing between the parties being hereby satisfactorily resolved;

(5) That Court costs due and owing the Clerk of the Montgomery County District Court in the sum of \$16.00 will be borne by Plaintiff/Appellee.

IT IS SO ORDERED.

Judge Floyd Van Palmer

Approved by:

/s/ Wallace M. Buck, Jr.

Wallace M. Buck, Jr.

Attorney for Plaintiff/Appellee

Larry W. Wall

Attorney for Defendant/Appellant

84-1162

No.

Supreme Court, U.S.
FILED

AUG 1 1984

ALEXANDER L. STEVAS

In the Supreme Court of the United States

October Term, 1984

JOHN L. VAKAS, M.D.,
Petitioner,

VS.

PAUL RODRIQUEZ, M.D., WILLIAM C. SWISHER,
M.D., FREDERICK J. GOOD, D.C., BETTY JO McNETT,
JOAN MARSHALL, D.C., JULIA BARBEE, D.O., HER-
MAN H. JONES, JR., M.D., F. LEE DOCTOR, D.O.,
JERRY L. JUMPER, D.O., JAMES A. McCLURE, M.D.,
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M.D., HAROLD L. SAUDER, D.P.M., JAMES D. BRUNO,
M.D., RICHARD J. CUMMINGS, M.D., F. J. FARMER,
D.O., HELEN GILLES, M.D., DAN A. KELLY, M.D.,
RICHARD A. UHLIG, D.O., JAMES R. CROY, D.C., REX
A. WRIGHT, D.C., THE STATE OF KANSAS, and THE
KANSAS STATE BOARD OF HEALING ARTS,
Respondents.

**SUPPLEMENTAL BRIEF TO
PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT**

GERRIT H. WORMHOUDT
(Counsel of Record)

LARRY W. WALL

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P.O. Box 997

Wichita, Kansas 67201

316-267-7361

Attorneys for Petitioner

1102

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No.

In the Supreme Court of the United States

October Term, 1984

JOHN L. VAKAS, M.D.,
Petitioner,

vs.

PAUL RODRIQUEZ, M.D., WILLIAM C. SWISHER,
M.D., FREDERICK J. GOOD, D.C., BETTY JO McNETT,
JOAN MARSHALL, D.C., JULIA BARBEE, D.O., HER-
MAN H. JONES, JR., M.D., F. LEE DOCTOR, D.O.,
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RICHARD A. UHLIG, D.O., JAMES R. CROY, D.C., REX
A. WRIGHT, D.C., THE STATE OF KANSAS, and THE
KANSAS STATE BOARD OF HEALING ARTS,
Respondents.

**SUPPLEMENTAL BRIEF TO
PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT**

SUPPLEMENTAL REASON FOR GRANTING THE WRIT

I. THE RECENT DECISION OF THE FIFTH CIRCUIT COURT OF APPEALS CREATES A DIRECT CONFLICT OF DECISION WITH THE TENTH CIRCUIT'S DISPOSITION OF PETITIONER'S CLAIMS.

In decisions filed within months of one another, the Fifth and Tenth Circuits resolved the identical issue of abstention in civil rights cases in a diametrically opposed manner. The correct adjudication of the Fifth Circuit dramatically exposes the speciousness of the Tenth Circuit's disposition of petitioner's case; this absolute confusion among the circuits is evidence of the disarray that will continue to exist until this Court speaks on the issues contained in the case now before the Court. This conflict makes issuance of a writ of certiorari imperative in this case.

In the opinion below, the Tenth Circuit affirmed the federal district court's dismissal of petitioner's complaint on grounds that adjudication of his constitutional claim for damages would constitute an impermissible intervention into the administrative scheme of a state disciplinary body. *See Petition for Certiorari*, App., p. A1. In contrast, the Fifth Circuit recently resolved an identical claim with precisely the opposite result, creating a direct conflict between the two circuits.

In *Bishop v. State Bar of Texas*, F.2d (5th Cir. July 16, 1984), plaintiff alleged that the state board had filed disciplinary proceedings against him to deter his exercise of constitutionally protected conduct. The

district court had dismissed on the basis of abstention; the Fifth Circuit was unequivocal and swift in its correction of the improper dismissal:

Although Texas disciplinary proceedings are capable of deciding constitutional challenges to specific procedures, recourse in those proceedings is not a sufficient avenue to remedy the constitutional injury done by bad faith proceedings themselves . . . The district court also erred in dismissing Bishop's claim for damages, a species of relief wholly unaffected by *Younger*.

Bishop, App., p. A1. The Fifth Circuit's correct decision, when coupled with the Tenth Circuit's incorrect disposition of an indistinguishable but more egregious violation of petitioner's constitutional rights, creates an absolute conflict of decision that can only be resolved by this Court.

CONCLUSION

This recent and inescapable conflict between two circuits graphically exhibits the divisiveness that will continue to exist on this crucial issue until this Court speaks. The opportunity to resolve the conflict and correct a manifest injustice to petitioner is now before this Court. Petitioner urges the Court to accept the opportunity.

Respectfully submitted,

GERRIT H. WORMHOUDT

(Counsel of Record)

LARRY W. WALL

JOHN E. COWLES

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316-267-7361

Attorneys for Petitioner

APPENDIX ITEM #1

George M. BISHOP,
Plaintiff-Appellant,

vs.

STATE BAR OF TEXAS, et al.,
Defendants-Appellees.

No. 84-2001

Summary Calendar.

United States Court of Appeals,
Fifth Circuit.

July 16, 1984.

Watkins, Kempner, Daughtrey & Associates, A.J. Watkins, Houston, Tex., for plaintiff-appellant.

Steven D. Peterson, State Bar of Texas, Jerry L. Zunker, Asst. Atty. Gen., Austin, Tex., for State Bar of Texas.

Hill & Ghiselli, Bertrand C. Moser, Houston, Tex., for Adam & Adam.

Appeal from the United States District Court for the Southern District of Texas.

Before REAVLEY, RANDALL and JOHNSON, Circuit Judges.

REAVLEY, Circuit Judge:

Attorney George M. Bishop alleged in a very sparse complaint that the State Bar of Texas has prosecuted disciplinary proceedings against him for many years, and

that these proceedings have been taken in "bad faith" and have been infected with various violations of due process. He sought injunctive relief, damages, and attorney's fees against the State Bar, and also asserted a pendent state claim of defamation against two lawyers, Terry J. and Robert J. Adam. The district court dismissed the complaint without prejudice on the ground that injunctive relief against pending bar disciplinary proceedings is barred by *Younger v. Harris*, 401 U.S. 37, 91 S.Ct. 746, 27 L.Ed.2d 669 (1971). We vacate and remand.

Younger and its progeny establish a strong policy against federal court interference with certain pending state proceedings absent extraordinary circumstances. See *Huffman v. Pursue, Ltd.*, 420 U.S. 592, 599-602, 95 S.Ct. 1200, 1206-07, 43 L.Ed.2d 482 (1975); *Younger*, 401 U.S. at 41, 91 S.Ct. at 749. But *Younger* acknowledged the continued vitality of *Dombrowski v. Pfister*, 380 U.S. 479, 85 S.Ct. 1116, 14 L.Ed.2d 22 (1965), by stating that federal courts should afford injunctive relief to a plaintiff who successfully establishes "the kind of irreparable injury, above and beyond that associated with a single prosecution brought in good faith, that had always been considered sufficient to justify federal intervention." *Younger*, 401 U.S. at 48, 91 S.Ct. at 752; see *id.* at 53, 91 S.Ct. at 755. The Court's opinions construing *Younger* have continued to recognize that a showing of "bad faith, harassment or other exceptional circumstances" may justify federal intervention. See *Trainor v. Hernandez*, 431 U.S. 434, 446, 97 S.Ct. 1911, 1919, 52 L.Ed.2d 486 (1977); *Huffman*, 420 U.S. at 611-12, 95 S.Ct. at 1212.

We have applied *Younger*'s exception for "bad faith prosecutions" in two major circumstances: first, when a state commences a prosecution or proceeding to retal-

iate for or to deter constitutionally protected conduct, e.g., *Smith v. Hightower*, 693 F.2d 359 (5th Cir. 1982); *Wilson v. Thompson*, 593 F.2d 1375 (5th Cir. 1979); and second, when the prosecution or proceeding is taken in bad faith or for the purpose to harass. E.g., *Fitzgerald v. Peek*, 636 F.2d 943 (5th Cir. 1981) (per curiam); *Shaw v. Garrison*, 467 F.2d 113, 119-21 (5th Cir.) cert. denied, 409 U.S. 1024, 93 S.Ct. 467, 34 L.Ed.2d 317 (1972).¹ In either case, irreparable injury under *Younger* is established by a sufficient showing of retaliatory or bad faith prosecution, and a federal injunction may issue. See *Wilson*, 593 F.2d at 1382-83 (retaliatory prosecution); *Shaw*, 467 F.2d at 120 (bad faith prosecution); cf. *Smith*, 693 F.2d at 366-67 (retaliation must be a "major motivating factor and (have) played a prominent role in the decision to prosecute").

In *Middlesex County Ethics Committee v. Garden State Bar Association*, 457 U.S. 423, 102 S.Ct. 2515, 73 L.Ed.2d 116 (1982), the Supreme Court held that attorney disciplinary proceedings are among those judicial proceedings invested with sufficiently important state interests to warrant *Younger* deference. *Id.* at 433-434, 102 S.Ct. at 2522-23. New Jersey's disciplinary proceedings afford adequate opportunity for attorneys to raise constitutional claims, reasoned the *Middlesex* Court, and the federal courts should therefore have abstained under *Younger* from interfering by injunction. Bishop does not and could not argue that Texas' interest in its pending disciplinary proceeding is less significant than New Jersey's. Nor does he contend that disciplinary proceedings in Texas

1. We recently affirmed the continued vitality of Shaw's major holding—that persons enjoy a constitutional right to be free of criminal prosecution initiated without probable cause. *Wheeler v. Cosden Oil & Chem. Co.*, 734 F.2d 254 (5th Cir. 1984) (considering effect of *Gerstein v. Pugh*, 420 U.S. 103, 95 S.Ct. 854, 43 L.Ed.2d 54 (1975)).

are any less judicial in nature than those in New Jersey. See Tex.Rev.Civ.Stat.Ann. art. 320a-1, §§ 12(a), 15, 16 (Vernon Supp. 1984).

Bishop does argue that the Texas disciplinary proceedings are inadequate to consider his constitutional claims. The State Bar responds that the proceedings offer sufficient opportunity to adjudicate all of Bishop's claims, including bad faith prosecution. Neither is correct. Plaintiff cites several constitutional infirmities in the disciplinary proceedings themselves; he alleges, for example, that he has been denied notice of the disbarment charges, a fair hearing, and an opportunity to confront and produce witnesses. Record at 200. We need not pass on the validity of these claims, for we conclude that, like New Jersey's in *Middlesex*, the Texas scheme for disciplining attorneys is fully capable of considering the constitutional arguments of attorney-defendants relating to specific procedures followed in their cases. *E.g.*, *Galindo v. State*, 535 S.W.2d 923 (Tex.Civ.App.—Corpus Christi 1976, no writ).

But the State Bar's argument goes too far. In applying *Younger* to attorney disciplinary proceedings, the *Middlesex* Court expressly noted that a showing of bad faith or harassment might justify federal injunctive relief. 457 U.S. at 436, 102 S.Ct. at 2524. Although Texas disciplinary proceedings are capable of deciding constitutional challenges to specific procedures, recourse in those proceedings is not a sufficient avenue to remedy the constitutional injury done by bad faith proceedings themselves. The right under *Shaw* is to be free of bad faith charges and proceedings, not to endure them until their speciousness is eventually recognized. *Shaw*, 467 F.2d at 122 n. 11. See *Younger*, 401 U.S. at 46, 91 S.Ct. at 751; *id.* at 56, 91 S.Ct. at 757 (Stewart, J. concurring);

Wilson, 593 F.2d at 1382-83. Thus, *Younger* forbade the district court from interfering with Bishop's disciplinary proceedings on the ground of specific constitutional flaws in the procedure followed in the state system. It did not foreclose injunctive relief based on Bishop's allegations of bad faith.

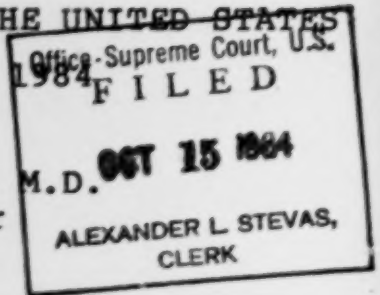
Because we consider a Rule 12 dismissal, our record is slim and our standard generous: we may affirm only if it appears beyond doubt that Bishop can prove no set of facts in support of his claim that would entitle him to relief. *Conley v. Gibson*, 355 U.S. 41, 45-46, 78 S.Ct. 99, 101-02, 2 L.Ed.2d 80 (1957); *Jones v. United States*, 729 F.2d 326, 330 (5th Cir. 1984). Bishop might have been more specific and artful in drafting his complaint, but its generality was not fatal. He alleged that the State Bar's efforts to discipline him had proceeded since 1976 and that they had been taken "in bad faith and for an improper motive." In this, he stated a claim for injunctive relief. The district court also erred in dismissing Bishop's claim for damages, a species of relief wholly unaffected by *Younger*. Finally, the district court exercised its discretion under *United Mine Workers v. Gibbs*, 383 U.S. 715, 86 S.Ct. 1130, 16 L.Ed.2d 218 (1966), and dismissed Bishop's pendent defamation claims. Because our action today removes the ground for this discretionary dismissal, we vacate the dismissal of Bishop's claims against Terry and Robert Adams and remand for reconsideration in light of our revival of the federal claims.

REVERSED in part, VACATED in part, and REMANDED.

(3)
No. 84-116

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1984



JOHN L. VAKAS, M.D.
Petitioner

v.

PAUL RODRIQUEZ, M.D., WILLIAM C.
SWISHER, M.D., FREDERICK J. GOOD, D.C.,
BETTY JO McNETT, JOAN MARSHALL, D.C.,
JULIA BARBEE, D.O., HERMAN H.
JONES, JR., M.D., F. LEE DOCTOR, D.O.,
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D.O., JAMES R. CROY, D.C., REX A.
WRIGHT, D.C., THE STATE OF KANSAS, and
THE KANSAS STATE BOARD OF HEALING ARTS
Respondents

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR
WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

ROBERT T. STEPHAN
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913/296-2215
Attorneys for Respondents
168 pp

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1984

JOHN L. VAKAS, M.D.
Petitioner

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PAUL RODRIQUEZ, M.D., WILLIAM C.
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JULIA BARBEE, D.O., HERMAN H.
JONES, JR., M.D., F. LEE DOCTOR, D.O.,
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WRIGHT, D.C., THE STATE OF KANSAS, and
THE KANSAS STATE BOARD OF HEALING ARTS
Respondents

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR
WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

October 12, 1984



QUESTIONS PRESENTED
FOR REVIEW

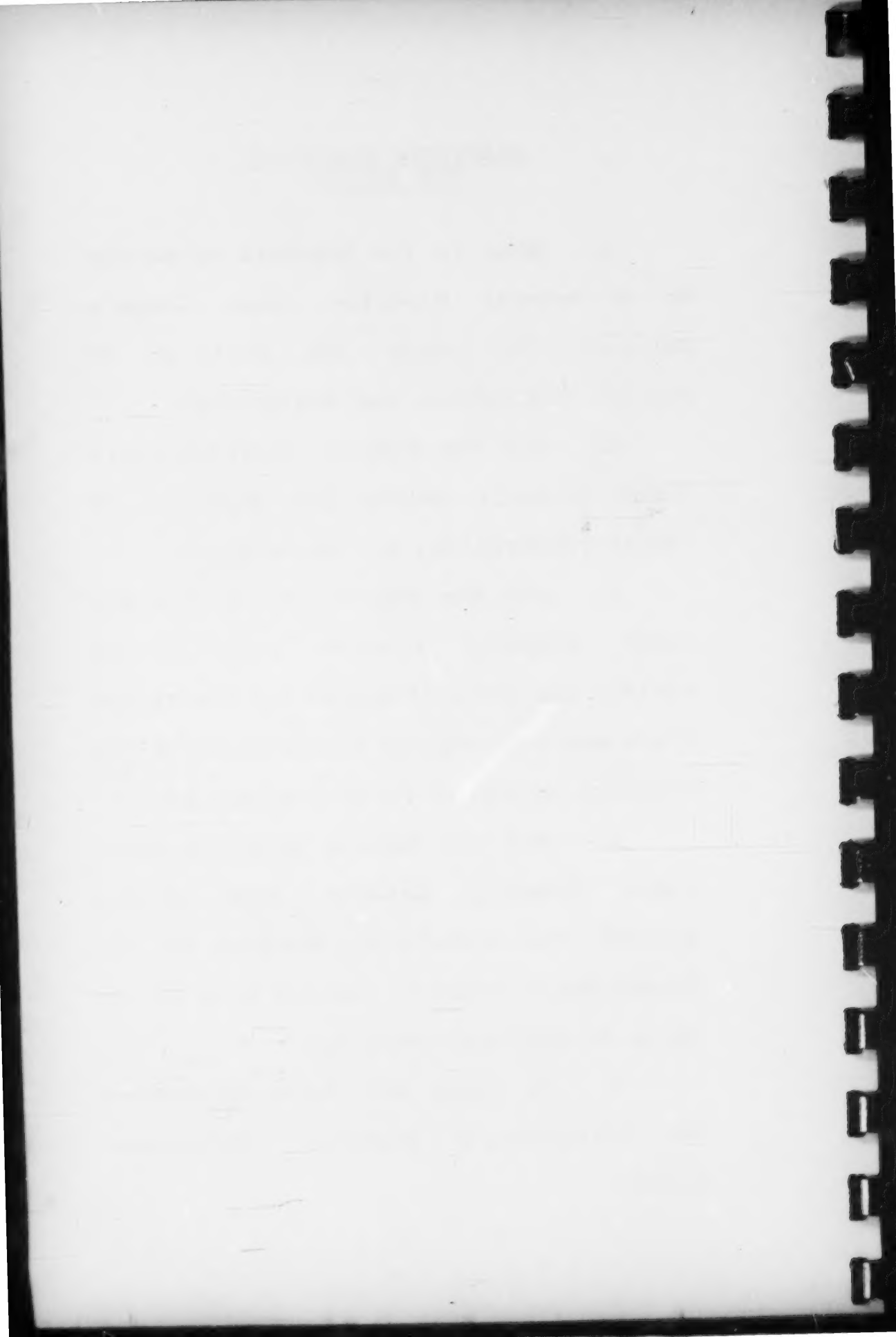
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2. Did The Federal District Court Judge Properly Invoke The Doctrine Of Comity, Federalism, And Abstention?

3. Did The Federal District Court Judge Properly Dismiss This Action Against The State Of Kansas And The Kansas State Board Of Healing Arts Because Of The Eleventh Amendment Jurisdictional Bar?

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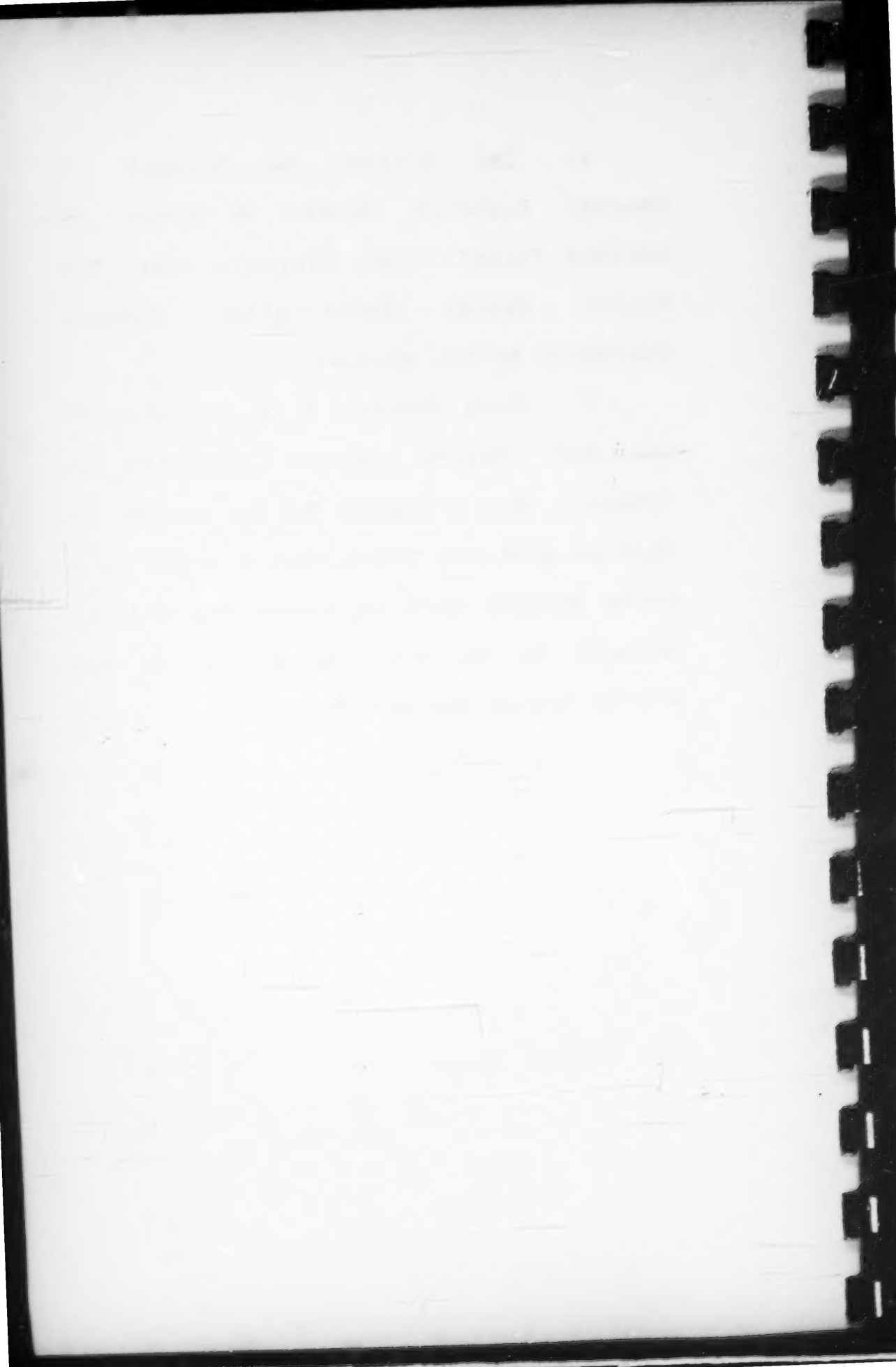
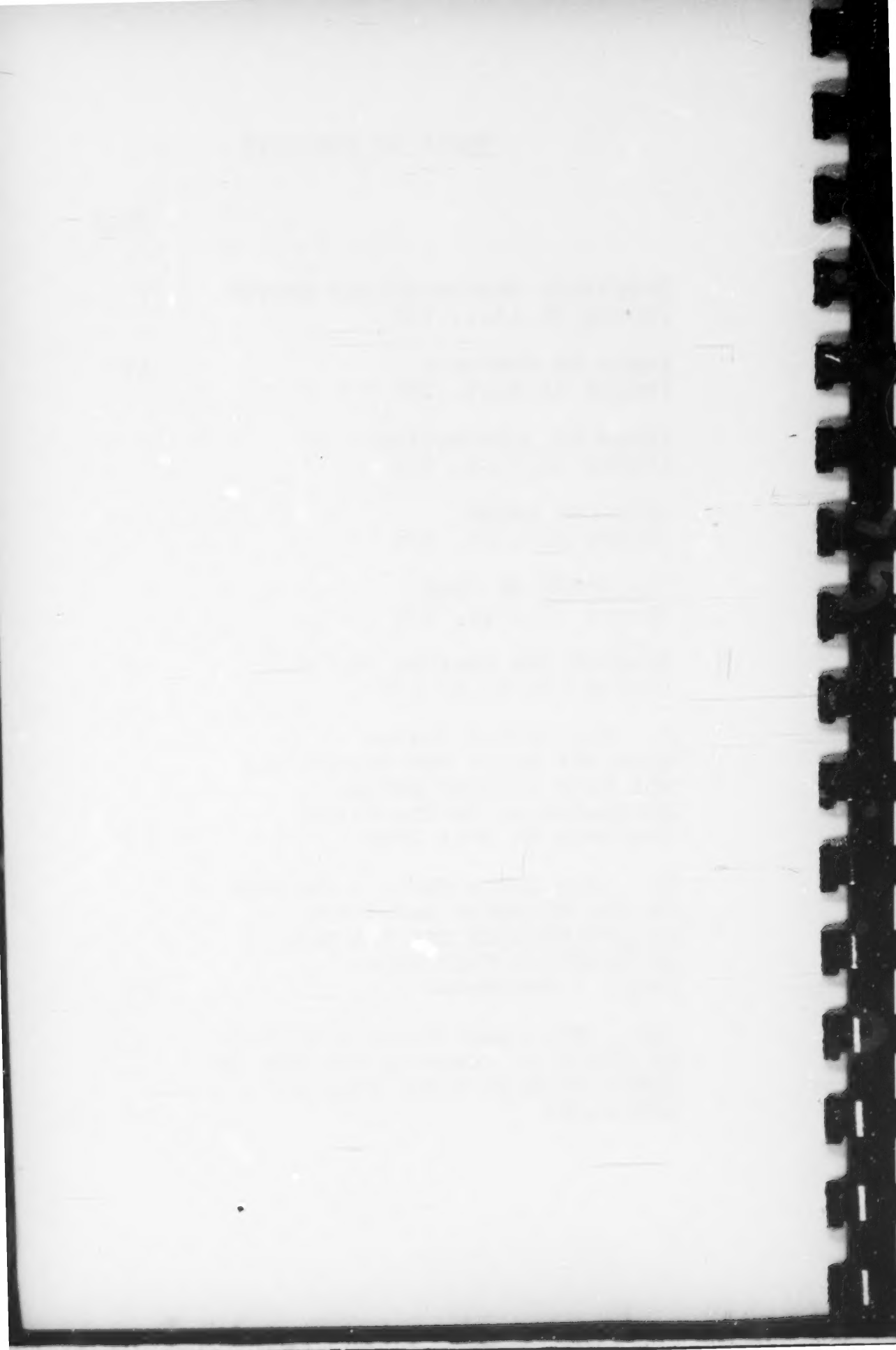


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OPINIONS BELOW

There are three court opinions relevant to this case. First is the opinion of Associate District Judge Floyd V. Palmer issued in Case No. 80 C 233, Kansas State Board of Healing Arts v. Vakas, District Court of Montgomery County, Kansas, issued October 20, 1981. That opinion is contained on pages A20 and A21 of the Petition for a Writ of Certiorari, as filed by Petitioner Vakas.

The second opinion is the oral opinion and order of the Honorable Patrick F. Kelly, Judge, United States District Court, Wichita, Kansas. His opinion was issued in Case No. 82-1589 on August 27, 1982. A copy of the transcript of those proceedings is included in this brief as Appendix Exhibit A.

The third opinion was issued by the Tenth Circuit Court of Appeals on March 7,

1984, and is reported as Vakas v. Rodriquez, et al., 728 F.2d 1293 (10th Cir. 1984). A copy of that opinion is contained on pages A1 through A9 of the Petition for a Writ of Certiorari, as filed by Petitioner Vakas.

STATEMENT OF CASE

The action now before this Court began on April 19, 1979, with a letter of complaint from six pharmacists in Coffeyville, Kansas, to the Kansas Board of Healing Arts, which stated in part:

We have reason to believe that John L. Vakas, M.D., Coffeyville, Kansas, through the abuse of his script-writing privileges, has helped to create a serious drug problem in our community and the surrounding area. (See, Appendix Exhibit B, attached hereto for full copy of letter.)

The Kansas Board of Healing Arts assigned an investigator to check on this charge. After the investigation in February,

1980, Dr. Vakas appeared before the Board to explain the complaints the Board of Healing Arts had been receiving concerning the number of prescriptions he had been writing for controlled and scheduled substances. At that February 23, 1980, hearing, a stipulation was presented to Dr. Vakas that he relinquish his Drug Enforcement Administration registration for one year. The Board decided that if he did not agree to the stipulation, the case should proceed to a formal hearing.

Dr. Vakas did not accept the stipulation, and in April, 1980, the Board of Healing Arts held that since the investigation showed there was substantiated evidence of excessive prescription writing, charges should be filed for disciplinary hearing. The hearing date was set for June 20, 1980,



and a hearing panel was instituted. On or about May 15, 1980, the Board denied a request by Dr. Vakas for continuance of the disciplinary hearing.

The disciplinary hearing was held on June 20 and 21, 1980, in Wichita, Kansas. The members of the panel were Paul Rodriquez, M.D., chairman, William Swischer, M.D., Dr. Marshall, Ms. McNett, Dr. Good, and Julia Barbee, M.D. The panel found Dr. Vakas used poor judgment and did over-prescribe controlled substances to his patients. It based its findings in part on the testimony that the drug dependency of Jack Atkins, D.C., was maintained by Dr. Vakas, and that the testimony of William Emmot, M.D., supporting the finding that Dr. Vakas over-prescribed controlled substances. The panel recommended that the license of Dr. Vakas be revoked, but that the revocation of his license be



stayed, provided he relinquish his D.E.A. registration for a period of one year. This recommendation was adopted by the Board of Healing Arts.

Dr. Vakas appealed this decision to the District Court of Montgomery County, Kansas. In October, 1981, the District Court of Montgomery County, Kansas, reversed and remanded the Board of Healing Arts' revocation of Dr. Vakas' license, due to procedural problems. The Montgomery County district court never held the Board's decision that Dr. Vakas over-prescribed controlled substances was not supported by the evidence. (See, Appendix Exhibit C attached hereto and p. A20-21 of Petition for Certiorari.)

In November, 1981, the Board of Healing Arts and Dr. Vakas began to discuss the possibility of arriving at some amicable conclusion of this case. In December, 1981, Dr. Vakas, through his



attorney, submitted to the Board of Healing Arts evidence of completion of various continuing education courses by Dr. Vakas in an attempt to show he had changed his method of medical practice. In late December, it was agreed that the Board of Healing Arts' investigator would talk to Dr. Vakas to determine whether he was attempting to change his method of practice. The Board of Healing Arts' investigator met with Dr. Vakas in March, 1982, and submitted his report to the Board. The Board of Healing Arts at that time had two alternate courses it could take in light of Judge Palmer's order. It could either take issue with Judge Palmer's findings and file an appeal to the Kansas Supreme Court, or it could, for the purposes of this particular case, accept the findings of Judge Palmer and have the matter remanded and reheard. In the spring of 1982, the Board also



considered an alternative to the two legal courses it had before it. The Board was willing to consider reaching an amicable conclusion of the case and not require additional hearings; in part, due to the costs of re-trying the case, the time necessarily involved therein, and the unavailability of important witnesses because of the passage of time. It was for this reason that the parties arranged for the Board of Healing Arts' investigator to investigate Dr. Vakas' continuing education courses and his attempts to change his method of practice. (See, Appendix Exhibit D.)

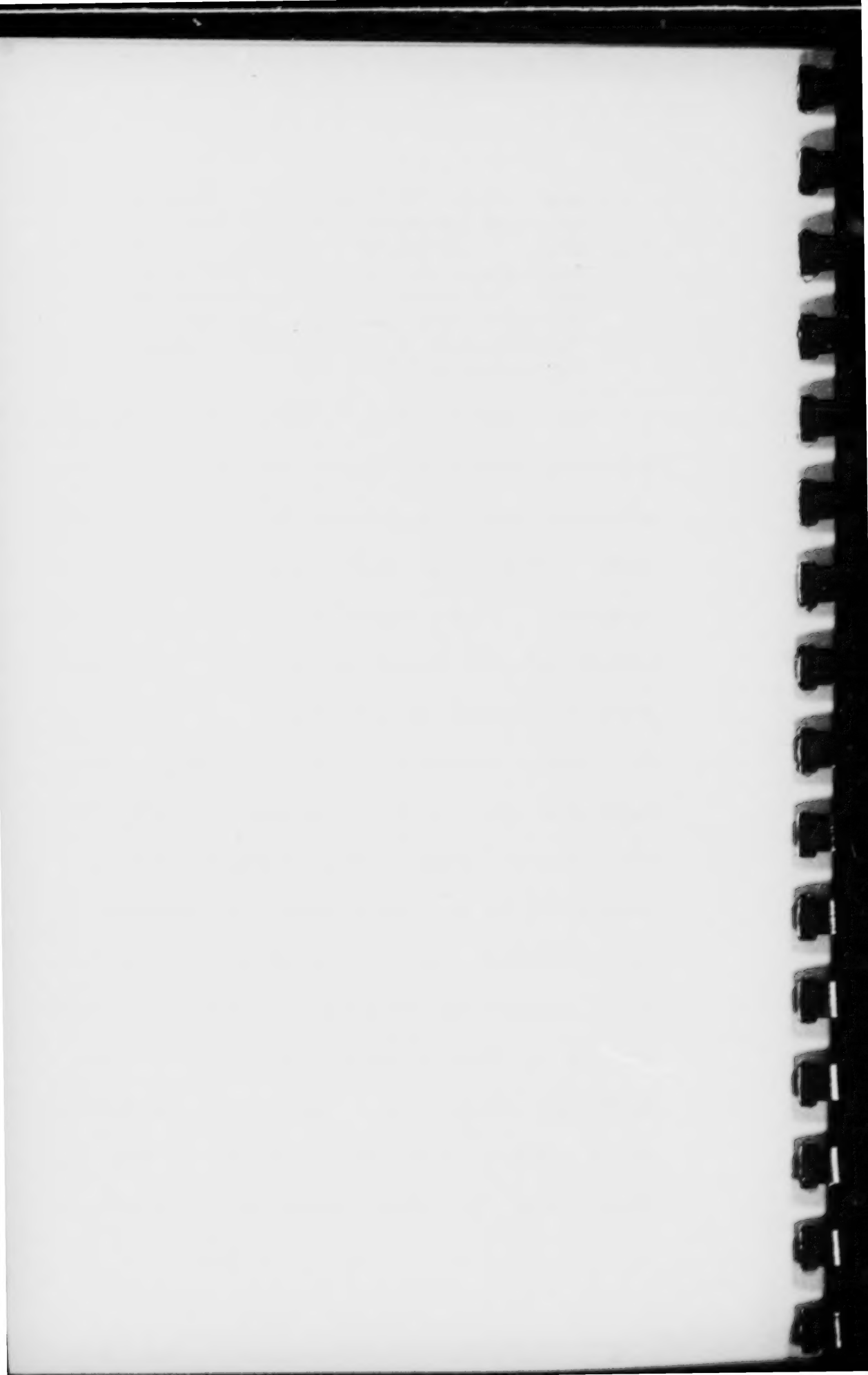
In April, 1982, the Board of Healing Arts offered to amicably resolve this matter with Dr. Vakas and proposed a journal entry in this action. The journal entry proposed by the Board of Healing Arts stated, in part:

(4.) That the parties hereto mutually agree that any



and all differences having existed between the parties are now resolved to the satisfaction of both parties. Any and all issues existing between the parties be hereby satisfactorily resolved. (See, Appendix Exhibit E.)

On April 30, 1982, Dr. Vakas' attorney wrote a letter to Wallace Buck, attorney for the Kansas Board of Healing Arts, rejecting that agreement without comment. (See, Appendix Exhibit F.) On behalf of the Board of Healing Arts, Mr. Buck responded to the April 30 letter of Dr. Vakas' attorney on May 5, 1982. (See, Appendix Exhibit G.) On May 8, 1982, for the first time, Dr. Vakas' attorney suggested to Mr. Buck that the language in his proposed resolution of this case was being viewed by them as a release of legal claims by this client, Dr. Vakas. (See, Appendix Exhibit H.) Mr. Buck responded to Dr. Vakas' attorney's letter on May 10, 1982, and in that response, stated in



part, on page 3 of that letter:

Obviously, if you are advising your client or suggesting lawsuits be filed by him against the Board, the Board cannot preclude this activity, nor does it choose to interfere with whatever thoughts you and your client are exchanging or intending.

Mr. Buck made it very clear that the language in the journal entry was not in any way to be taken as a waiver of any legal claims; rather, Mr. Buck made it clear that the only purpose of the proposed resolution was to conclude the procedure before the Board of Healing Arts. (See, Appendix Exhibit I.) Respondents feel that many parts of petitioner's Statement of the Case, as contained on pages 3, 4, and 5 of his petition for certiorari are patently false when discussing his "extortion" allegations.

In June, 1982, a journal entry was finally signed in the appeal heard by the

District Court of Montgomery County, Kansas, and the state district court remanded the disciplinary action against Dr. Vakas back to the Board of Healing Arts for further hearing. A hearing date was set on August 21, 1982, so the Board of Healing Arts could re-hear the case following all due process standards, pursuant to the order of the Montgomery County district court.

On July 16, 1982, prior to the scheduled date of rehearing, petitioner Vakas filed this lawsuit in federal court, seeking to have the state court and state administrative proceedings enjoined and monetary damages for the constitutional violations found by Judge Palmer. Due to the action pending in federal court against the State of Kansas, the Kansas Board of Healing Arts, and members of the Board, the Kansas Board of Healing Arts agreed to grant a

continuance of the date scheduled for the rehearing of the disciplinary action against petitioner Vakas until the federal court lawsuit could be resolved.

Respondents below moved to dismiss petitioner Vakas' lawsuit on the bases of the Eleventh Amendment jurisdictional bar, judicial or quasi-judicial immunity, that federal district courts are without subject matter jurisdiction to review state professional disciplinary proceedings and on the grounds of comity, federalism, and abstention.

Petitioner Vakas' federal court lawsuit was dismissed on August 27, 1982, after a hearing before the Honorable Patrick F. Kelly, United States District Judge. The district court granted respondents' motions to dismiss, holding that the State and the Board were immune from suit in federal court under the Eleventh Amendment, that the respondent

Board members were protected from suit because of judicial immunity, and pursuant to the teachings of Middlesex and Younger, the Court exercised its discretion and refused to hear the case upon comity, federalism, and abstention grounds. (See, Appendix Exhibit A.) Thereafter, the Board of Healing Arts once again re-set petitioner Vakas' disciplinary action for rehearing, pursuant to the remand order of the District Court of Montgomery County, Kansas.

Prior to the Board of Healing Arts' rehearing of this case, petitioner Vakas, through his attorneys, asked the Kansas Board of Healing Arts to once again consider amicably resolving this disciplinary claim as they had been willing to do in the spring of 1982. The Board considered petitioner Vakas' request and agreed with petitioner Vakas

to resolve the disciplinary complaint, because of the time and money expense involved because the passage of time had caused major witnesses to become unavailable. The case was settled and since December, 1982, there has not been any underlying administrative action in this case. Kansas statutes have since been changed in an attempt to alleviate some of the problems involved in Dr. Vakas' case. (See 1984 Session Laws of Kansas, Ch. 237.)

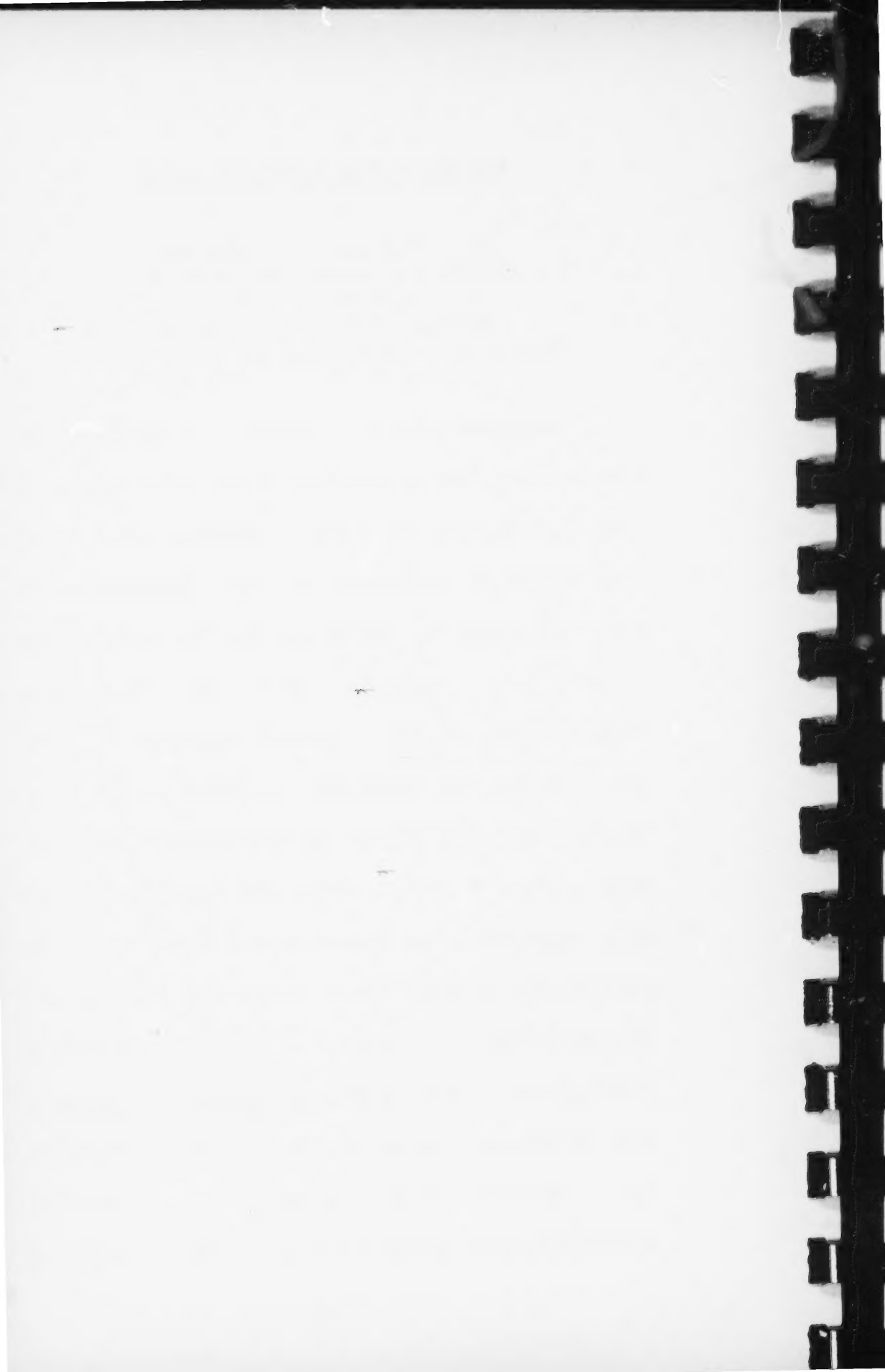
This action was appealed to the United States Court of Appeal for the Tenth Circuit by petitioner Vakas from the dismissal of his federal court claims by the United States District Court for the District of Kansas. The Tenth Circuit Court of Appeals affirmed the district court decision on March 7, 1984. It is that opinion which petitioner Vakas seeks to have reviewed by this Court.



REASONS FOR DENYING WRIT

I. THE UNITED STATES
DISTRICT COURT FOR KANSAS
DID NOT HAVE SUBJECT
MATTER JURISDICTION IN
THE FIRST INSTANCE IN THIS CASE

Respondents have maintained throughout this action that the federal courts, based on long-standing case law, are without subject matter jurisdiction in this action, both as to the requested injunctive relief and as to the underlying civil rights action. The purpose of the instant lawsuit is to stop state disciplinary proceedings against petitioner Vakas. When the same concepts are applied to attorneys, the law is extremely clear that even if the state proceedings are constitutionally deficient, the federal district courts are without subject matter jurisdiction to review the state professional disciplinary proceedings. See, Selling



v. Radford, 243 U.S. 46 (1917); Theard v. U.S., 354 U.S. 278 (1957); Schware v. Board of Bar Examinations of New Mexico, 353 U.S. 232 (1957); Konigsberg v. State Bar of California, 353 U.S. 252 (1957); Gately v. Sutton, 310 F.2d 107 (10th Cir. 1962); Mayes v. Honn, 542 F.2d 822 (10th Cir. 1976); Doe v. Pringle, 550 F.2d 596 (10th Cir. 1976); MacKay v. Nesbett, 412 F.2d 846 (9th Cir. 1969) cert. denied, 396 U.S. 960 (1969); Ginger v. Circuit Court for County of Wayne, 372 F.2d 621 (6th Cir. 1967) cert. denied, 387 U.S. 935 (1967); Feldman v. State Board of Law Examiners, 438 F.2d 699 (8th Cir. 1971); Jones v. Hulse, 391 F.2d 198 (8th Cir. 1968) cert. denied, 393 U.S. 889 (1968); In Re MacNeil, 266 F.2d 167 (1st Cir. 1959); Clark v. State of Washington, 366 F.2d 678 (9th Cir. 1966); Lenske v. Sercombe, 266 F.Supp. 609 (D.C. OR. 1967) aff'd., 401 F.2d 520 (9th Cir. 1968);

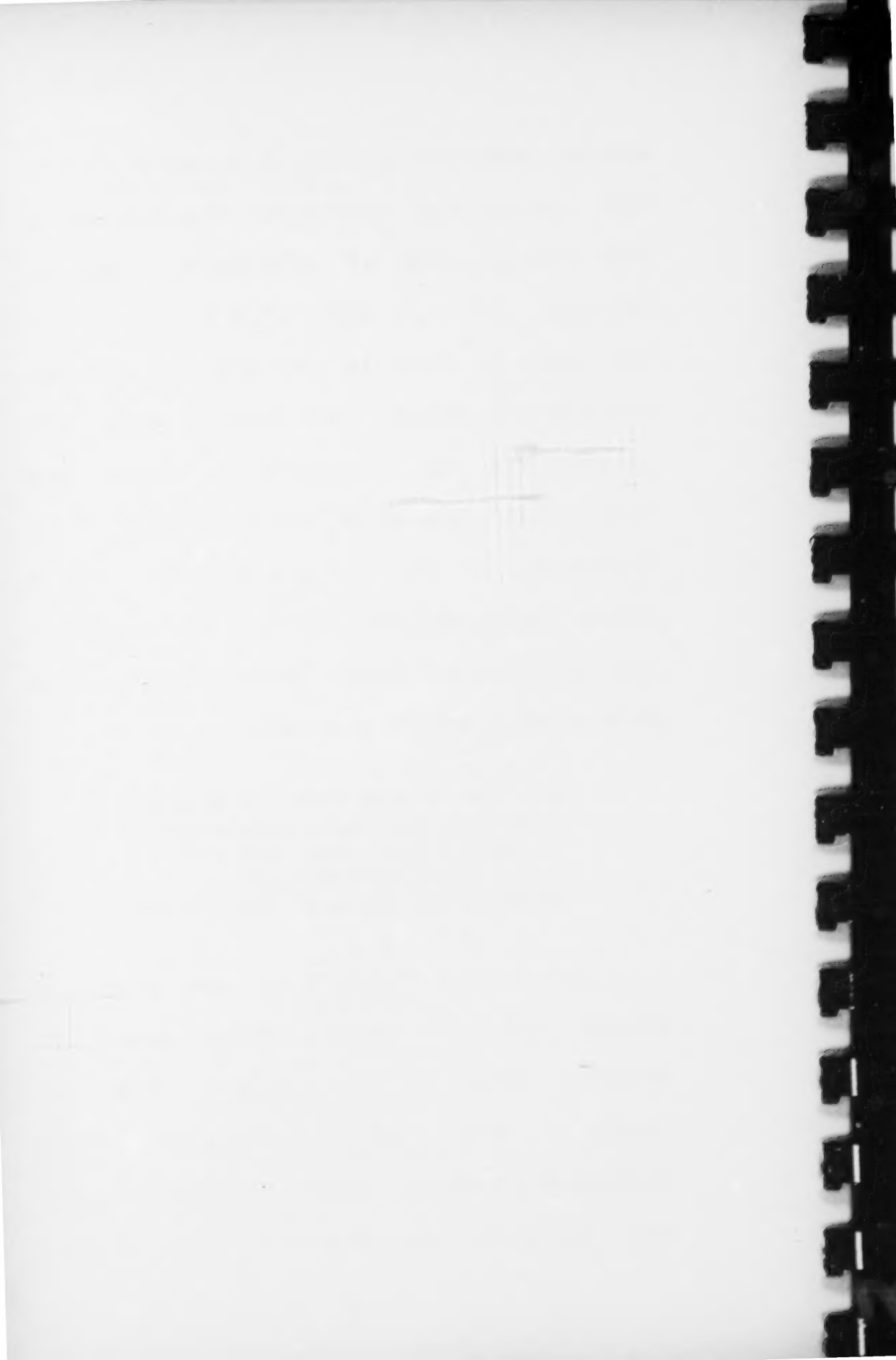
Turner v. American Bar Association, 407 F.Supp. 451 (W.D. Wisc. 1975); Diehl v. United States, 438 F.2d 705 (5th Cir. 1971) (cert. denied, 404 U.S. 830 (1971)); Polk v. State Bar of Texas, 480 F.2d 998 (5th Cir. 1973); Saier v. State Bar of Michigan, 293 F.2d 756 (6th Cir. 1961); Mildner v. Gulotta, 405 F.Supp. 182 (E.D. N.Y. 1975); Tang v. Appellate Division, 487 F.2d 138 (2d Cir. 1973) cert. denied, 416 U.S. 906 (1974); Coogan v. Cincinnati Bar Association, 431 F.2d 1209 (6th Cir. 1970); Getty v. Reed and Collis v. Reed, cons'd, 547 F.2d 971 (6th Cir. 1977); Niles v. Lowe, 407 F.Supp. 132 (D.C. HA 1976).

This fundamental law is not changed by labeling the cause as a "civil rights" action. In the Tenth Circuit, a civil rights action can be maintained when the allegations claim due process or equal protection deprivations in the adoption

and/or administration of general rules and regulations governing the admission and disciplining of attorneys. Doe v. Pringle, 550 F.2d 596 (10th Cir. 1976). The same is true in the present action. Petitioner Vakas has never made any allegations to the general rules and regulations regarding the disciplining or licensing of doctors in Kansas. This Court lacks subject matter jurisdiction over petitioner Vakas' allegations. The writ should not be granted.

II. THE LOWER COURT'S RULINGS
ON THE ELEVENTH AMENDMENT
JURISDICTIONAL BAR ARE
NOT IN CONFLICT
WITH OTHER COURTS' DECISIONS

Petitioner Vakas sued the State of Kansas and the Kansas State Board of Healing Arts in the federal district court. The federal district court dismissed both of these parties because the Eleventh Amendment to the United



States Constitution prohibits the bringing of a suit against a state or an alter ego of a state in federal court. (See, Appendix Exhibit A.)

No one has ever questioned the Kansas State Board of Healing Arts is an alter ego of the State of Kansas, created by the State to regulate the practice of the healing arts within the State. See, K.S.A. 65-2801, et seq.

No one in this action has ever questioned the State of Kansas is one of the fifty states. The act for the admission of Kansas into the Union provides, in part:

That the state of Kansas shall be, and is hereby declared to be, one of the United States of America, and admitted into the Union on an equal footing with the original states in all respects whatever. (Act. Jan. 29, 1861, Ch. 20, §1, 12 Stat. 126.)

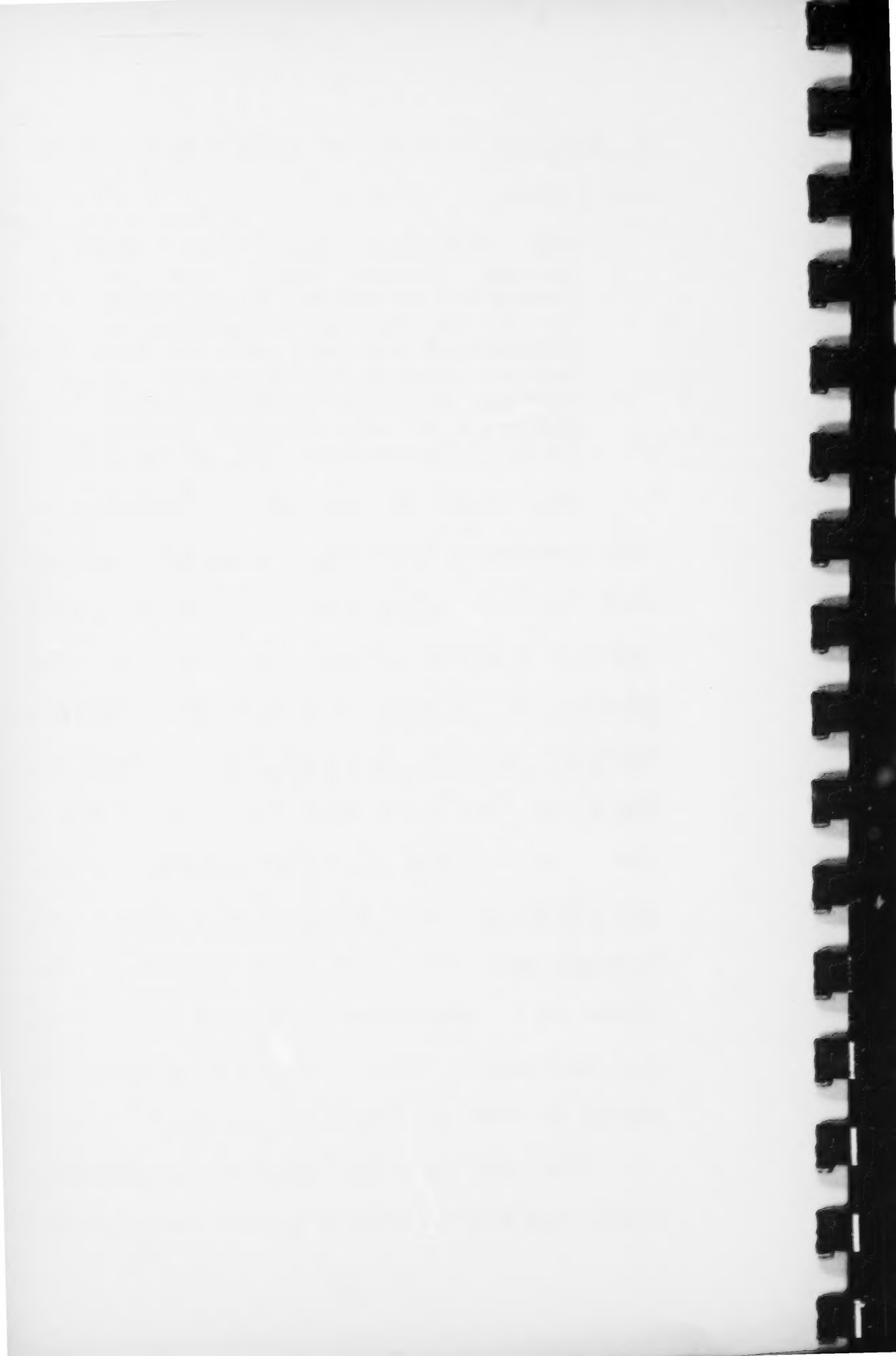
The Eleventh Amendment was ratified in 1798 in response to the case of Chisolm

v. Georgia, 2 U.S. (2 Dall.) 419 (1793),
and states:

The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State or by Citizens or Subjects of any Foreign State. (U.S. Constitution, Amend. XI.)

The scope of the plain language of the amendment has been widened through judicial interpretation to preclude suits against a state by her own citizens, see Edelman v. Jordan, 415 U.S. 651 (1974); Unified School District No. 480 v. Epperson, 583 F.2d 1118 (10th Cir. 1978); and by foreign governments, see Principality of Monaco v. State of Mississippi, 292 U.S. 313 (1934). The Eleventh Amendment serves as a jurisdictional bar to suit against a state in federal district courts.

The law in this area is absolutely clear and may be simply stated as follows:



In a United States district court a state is absolutely immune in law or in equity for damages or any other relief, either prospective or retrospective in nature, in any action brought by any citizen. See Edelman v. Jordan, supra; Monroe v. Pape, 365 U.S. 167 (1961); Quern v. Jordan, 440 U.S. 332 (1979); Alabama v. Pugh, 438 U.S. 781 (1978); Hutto v. Finney, 437 U.S. 678 (1978); Cory v. White, 457 U.S. 85, 102 S.Ct. 2325 (1982); Unified School District No. 480 v. Epperson, supra. This jurisdictional bar extends to state agencies. See, Mt. Healthy City School Dist. Bd. of Ed. v. Doyle, 429 U.S. 274, 280 (1974).

There are only two exceptions to this absolute immunity granted by the Eleventh Amendment.

The most significant court-created exception to the Eleventh Amendment prohibition is contained in Ex parte

Young, 209 U.S. 123 (1908). There, the Supreme Court held that suits seeking declaratory or injunctive relief against state officials are not barred. The exception is justified by the distinction between suits directly against the sovereign states, and suits against state officials who, if engaging in unconstitutional conduct, lose their official representative character and can be held accountable for their individual conduct. Id., at 159-60. Thus, this concept is not really an exception to the Eleventh Amendment, but only allows suits against state officials. Because the retrospective award of damages by a federal court against a state, payable from the state treasury, is clearly prohibited by the Eleventh Amendment, Edelman v. Jordan, supra, only prospective equitable relief is available even when state officials are named as



defendants, Quern v. Jordan, supra, and that relief is against the state official, not the state itself which remains immune, Alabama v. Pugh, supra, and Hutto v. Finney, supra.

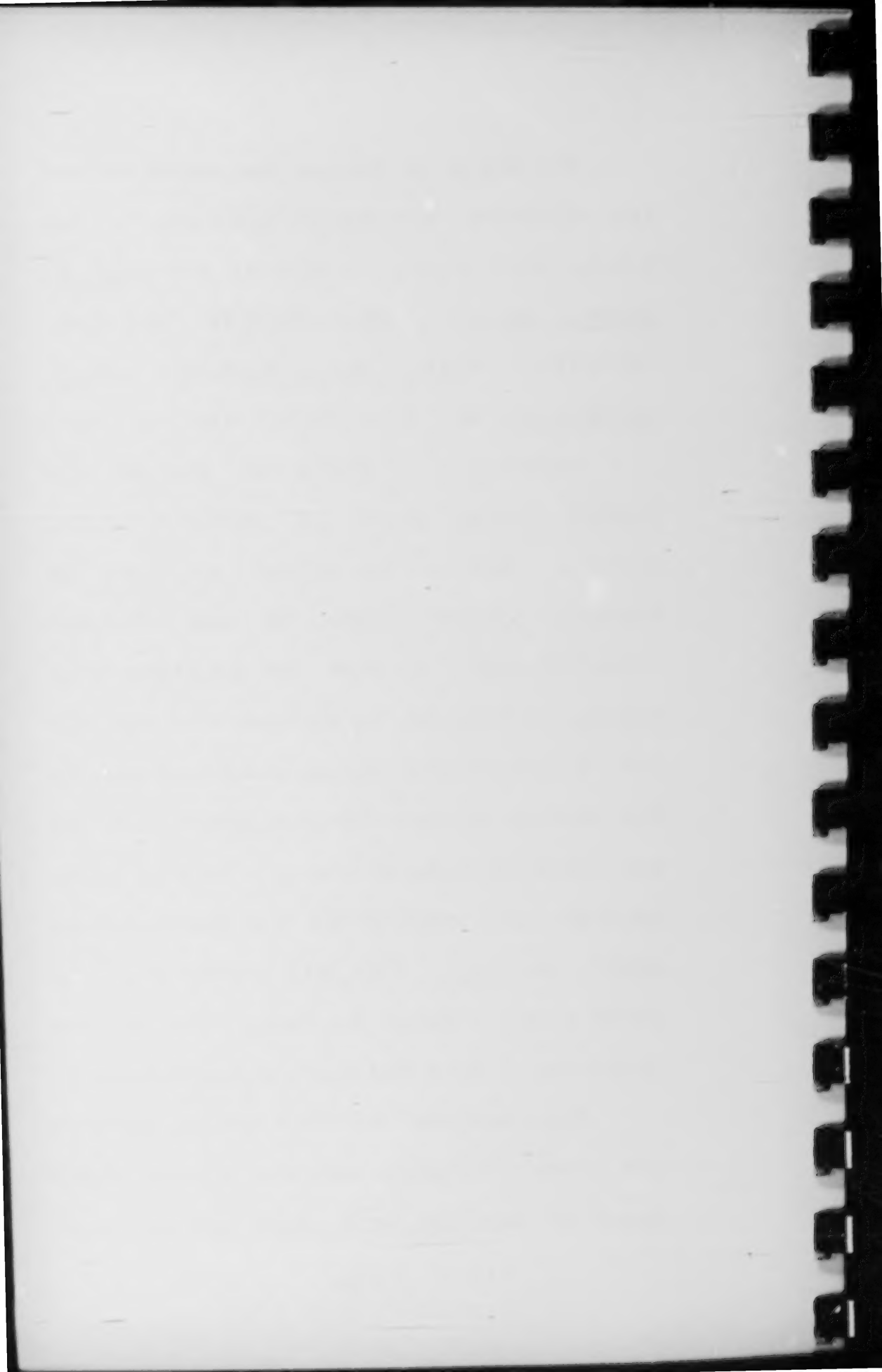
The other significant exception is when suit against a state is either expressly allowed by United States congressional legislation, predicated on the Fourteenth Amendment to the United States Constitution, [Fitzpatrick v. Bitzer, 427 U.S. 445 (1976), wherein it was held that Congress had expressly abrogated the states' Eleventh Amendment immunity by passage of the 1972 Amendment to the Civil Rights Act of 1964 (Title VII)], or when a state has waived its immunity.

The United States Congress has never authorized suit against the state pursuant to 42 U.S.C. §1981, et seq. See statutes and Quern v. Jordan, supra.

The State of Kansas has never waived its Eleventh Amendment immunity. See K.S.A. 1983 Supp. 75-6116(d) and Noel v. Blues, et al., No. 82-2184 (D. Kan. 10/4/82; Holt v. Wichita State University, No. 82-1172 (D. Kan. 9/7/82).

Respondents, State of Kansas and Kansas State Board of Healing Arts, further believe an action may not be brought against them in any federal district court because jurisdiction over states is limited, by Section 2 of Article III of the United States Constitution, to the United States Supreme Court and not any inferior federal court. This is true, because that section of the Constitution says, in part, "In all Cases . . . in which a State shall be Party, the supreme Court shall have original Jurisdiction."

The dismissal of this action against the State of Kansas and the Kansas State Board of Healing Arts does not conflict



with any established court decisions. Petitioner Vakas' request for the writ should be denied.

III. THE LOWER COURT'S RULINGS
ON JUDICIAL IMMUNITY ARE
NOT IN CONFLICT WITH
OTHER COURTS' DECISIONS

Petitioner Vakas also brought his lawsuit against the individual members of the Kansas State Board of Healing Arts. As to those respondents, the federal district court dismissed petitioner Vakas' action because, as a matter of law, he found the Board to be a quasi-judicial body and its members to be entitled to judicial immunity. (See Appendix Exhibit A.)

Members of administrative boards who perform judicial functions are immune from damages in a 42 U.S.C. §1983 action to the same extent that judges are immune from suit. Butz v. Economou, 438 U.S.



478, 57 L.Ed.2d 895, 98 S.Ct. 3894 (1977). Administrative boards that perform judicial functions are sometimes referred to as quasi-judicial agencies.

In Thompson v. Amis, 208 Kan. 658, 663, 493 P.2d 1259 (1972), the Kansas Supreme Court defined quasi-judicial. The Court stated:

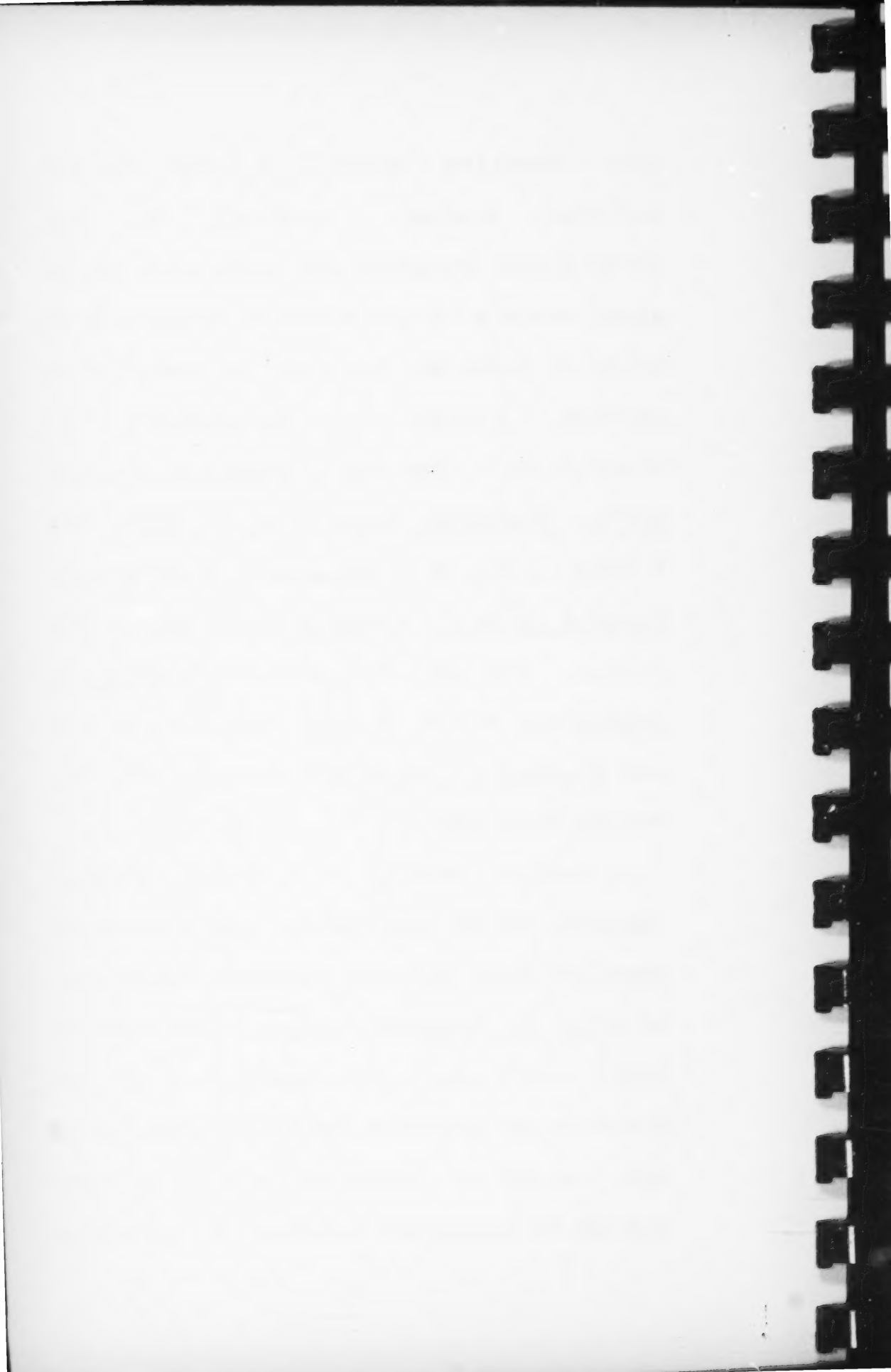
It may be added that quasi-judicial is a term applied to administrative boards or officers empowered to investigate facts, weigh evidence, draw conclusions as a basis for officials actions, and exercise discretion of judicial nature.

This Court in Butz v. Economou, supra, also employed this same test. In Butz v. Economou, supra, this Court said the crucial question in determining whether judicial immunity applies to an administrative board is whether the administrative board shares enough of the characteristics of the judicial process that those who participate in the adjudication are immune from lawsuits.

The Kansas Healing Arts Act, K.S.A. 65-2801, et seq., provides for an adversary proceeding in matters of limitation, suspension, or revocation of a license. It provides the board members shall act without partiality. It also provides for the presentation of oral and documentary evidence and a hearing. Additionally, after the hearing the Board issues findings of fact, conclusions of law, and makes its decision concerning whether to issue an order of revocation, suspension, or limitation of a license. The Act provides the Board may issue subpoenae in a manner like the district courts of the state. The Board may rule on evidence, regulate the course of the hearing, and may make recommendations. Additionally, the Kansas Board of Healing Arts is considered to be an integral part of the Kansas judicial system in that appeals from Board decisions are brought

into district court in the Kansas judicial system. Based on the above-cited statutes and case law, it is clear members of the Board of Healing Arts serve a judicial function in matters of license revocation, suspension, or limitation. (See also, Jordan v. Hawaii Gov't. Employee Assn., Local 152, 472 F.Supp. 1123 (D. HA 1979); Kondosta v. Vermont Elec. Cooperative, Inc., 400 F.Supp. 358 (D. VT. 1975); Sellers v. Procunier, 641 F.2d 1295 (9th Cir. 1981); and Morales v. Vega, 483 F.Supp. 1075 (D. Puerto Rico 1979).

Public policy requires judicial immunity to be granted to administrative agencies that perform judicial functions. In Butz v. Economou, supra, the Supreme Court reaffirmed the importance of the doctrine of applying judicial immunity to administrative agencies with judicial duties to encourage unfettered, impartial



decisionmaking by officials vested with such adjudicatory authority. The Court held the immunity was necessary to assure that judges, advocates, and witnesses can perform their respective functions without harassment or intimidation. In all judicial and quasi-judicial litigation, there is always the possibility there will be disappointed litigants. In Sellars v. Procnier, supra, the Court held the decisionmaker in quasi-judicial proceedings should not be under pressure by the constant threat of litigation by disappointed litigants. The members of the Kansas Board of Healing Arts are asked to make important decisions concerning the licensure of health care professionals and in order to make these decisions in an impartial manner, free from threat and fear of litigation, public policy encourages they be granted judicial immunity from suits for damages.



Petitioner Vakas claims that judges and quasi-judicial agencies are not immune when they act unconstitutionally in an intentional, deliberate, and malicious manner. Petitioner Vakas wants the opportunity to prove the deliberate and intentional nature of the unconstitutional actions of the members of the Board during the administrative hearings. This is a misstatement of the law regarding judicial immunity. This Court addressed the scope of judicial immunity in Stump v. Sparkman, 435 U.S. 349, 55 L.Ed.2d 331, 98 S.Ct. 1099 (1978) reh. den., 436 U.S. 951. In that case, this Court held that judges are absolutely immune from damage suits under 42 U.S.C. §1983, when acting as judges, and are only subject to suit when they have acted in "clear absence of all jurisdiction." Stump v. Sparkman, supra, at 357. Judicial immunity is applied when



two tests are met. The first test is whether the judge had jurisdiction to act in the matter (was it within the judge's normal function), and the second test is whether the parties dealt with the judge in his judicial capacity. Stump v. Sparkman, supra, at 362.

In its decision in the Stump case, this Court held:

A judge will not be deprived of immunity because the action he took was in error, was done maliciously, or was in excess of his authority; rather he will be subject to liability only when he has acted in "the clear absence of all jurisdiction." 13 Wall., at 351, 20 L.Ed. 646. (Id., at 356.)

There is no separate concept of quasi-judicial immunity apart from the concept of judicial immunity. Rather, administrative boards who act in an adjudicatory capacity, sometimes called quasi-judicial boards, are entitled to judicial immunity.

Since the Board of Healing Arts is an adjudicatory administrative body, and since the members of the Board were acting within their statutorily authorized jurisdiction in adjudicating the disciplinary action involving petitioner Vakas, they are entitled to immunity from petitioner Vakas' suit for damages pursuant to 42 U.S.C. §1983. Butz v. Economou, supra; Stump v. Sparkman, supra. See also, Dennis v. Sparks, 449 U.S. 24, 66 L.Ed.2d 185 (1980), where the judge involved was granted judicial immunity, even though he had accepted a bribe for ruling a certain way.

The lower court's findings that the individual members of the Kansas State Board of Healing Arts acted as a quasi-judicial body and were, therefore, clothed with judicial immunity which required dismissal of Petitioner Vakas' action were not contrary to any

established court authority and were in complete agreement with the teachings of this Court. Petitioner Vakas' petition for a writ of certiorari should be denied.

IV. THE FOURTEENTH AMENDMENT
ARGUMENTS OF PETITIONER
IS A NON-ISSUE

Petitioner Vakas, throughout the appeal of this case, has tried to have the Fourteenth Amendment recognized as a separate and distinct cause of action. This is a non-issue in this case, and this action is not a proper case for this Court to make such a decision.

This action was dismissed at the district court level on the concepts of the Eleventh Amendment jurisdictional bar, the concept of judicial immunity, and the doctrine of comity, federalism, and abstention. All of those concepts and their application are discussed elsewhere in this brief. All of those concepts would be equally applicable to this case

even if this Court should decide that a private right of action existed under the Fourteenth Amendment; hence, the whole concept is a non-issue. Petitioner Vakas' request for a writ of certiorari should be denied.

V. THE DOCTRINES OF COMITY,
FEDERALISM, AND ABSTENTION
WERE PROPERLY INVOKED BY THE
DISTRICT COURT IN THIS ACTION

After careful review of Petitioner Vakas' original action, the district court judge decided this was a proper case to invoke the doctrines of comity, federalism, and abstention and to dismiss the action on those bases as to all respondents, in addition to other reasons and even if a cause of action was stated by petitioner Vakas.

Statutory and case law have resoundingly espoused the principle that federal courts should pursue a "hands-off" or "nonintervention" doctrine

when injunctive relief is sought to enjoin the actions of a state court, although many different names for this principle have been used. Where, as here, the exercise of authority by state boards and officials is attacked, federal courts must be constantly mindful of the "special delicacy of the adjustment to be preserved between federal equitable power and state administration of its own law. Stefanelli v. Minard, 342 U.S. 117, 120 (1951) " Rizzo v. Goode, 423 U.S. 362, 378 (1976).

This Court has had the opportunity to address the issue of federal court restraint in enjoining state civil proceedings on a number of occasions. In Huffman v. Pursue, Ltd., 420 U.S. 592 (1975), Rizzo v. Goode, supra, Juidice v. Vail, 430 U.S. 327 (1977), and Middlesex County Ethics Committee v. Garden State Bar Assoc., 457 U.S. 423, 102 S.Ct. 2515

(1982), this Court extended the doctrine of restrain enunciated in Younger v. Harris, supra, beyond the criminal content and has applied the principles of comity, federalism, and abstention to include civil actions.

In both Huffman and Juidice, this Court focused upon the notion of "comity," which it defined as:

A proper respect for state functions, a recognition of the fact that the entire country is made up of a Union of separate governments, and a continuance of the belief that the National Government will fare best if the States and their institutions are left free to perform their separate functions in their separate ways. Juidice, 430 U.S. at 334, quoting Huffman, 420 U.S. 1592, 601, 43 L.Ed.2d 482, 95 S.Ct. 1200, and Younger, 401 U.S. 37, 44, 27 L.Ed.2d 669, 91 S.Ct. 746.

In Juidice, the decision focused upon appellees' "opportunity" to present their federal claims in the state proceedings. Acknowledging that the opportunity was

present, the Court concluded, "no more is required to invoke Younger abstention." 430 U.S. 327, 1k337, 51 L.Ed.2d 376, 97 S.Ct. 1211. The abstention doctrine has also been extended to include child abuse in Moore v. Sims, 442 U.S. 415 (1979), and to state efforts to control welfare programs in Trainor v. Hernandez, 431 U.S. 434 (1977). In Moore v. Sims, supra, it was stated this doctrine of abstention prohibits federal court intervention unless the refusal of intervention would result in great and immediate irreparable injury to the plaintiff. In Kugler v. Helfant, 421 U.S. 117 (1975), the doctrine of abstention was said to be founded on notions of equity and comity with the federal system, and on notions properly assuming that state proceedings provide a full and fair opportunity for the vindication of federal constitutional rights.

The application of the principles set out in Middlesex County Ethics Comm. v. Garden State Bar Association, supra, required that the district court abstain from taking jurisdiction and dismiss petitioner Vakas' claims. This Court in Middlesex held that abstention is appropriate in this type of case when three factors are met: (1) does the action seek to enjoin an ongoing state judicial proceeding; (2) do the proceedings implicate important state interests; and (3) is there an adequate opportunity in the state proceedings to raise constitutional challenges? The state's interest in maintaining and assuring the professional conduct of the doctors it licenses cannot be questioned. It is as great as the state's interest in assuring the professional conduct of its lawyers. The purpose of the Kansas Healing Arts Act succinctly states the



act's importance to the state and its people. K.S.A. 65-2801. The purpose of the Healing Arts Act is to protect the public against unprofessional, improper, unauthorized, and unqualified practice of the healing arts. Certainly, the state and the public have an interest in assuring a medical practitioner is not overprescribing controlled and scheduled drugs.

Policy and law of this Court, as expressed in the Younger, supra, and Middlesex cases clearly hold the United States district courts should not entertain jurisdiction in cases like the one presently before this Court.

This Court has often suggested that federal courts should restrain themselves from interfering in what is essentially a state matter, using the doctrine of comity, federalism, and abstention. The district court, knowing this case and

using its discretion, decided to invoke those doctrines and dismiss petitioner Vakas' action. This proper ruling should not be disturbed on appeal. Petitioner Vakas has never made a showing that the district court abused its discretion. The writ should not be granted.

VI. PETITIONER VAKAS HAS NOT PRESENTED AN ISSUE OF NATIONAL IMPORTANCE, NOR HAS HE PRESENTED AN IMPORTANT FEDERAL QUESTION

Petitioners seeking a writ of certiorari from this Court have an obligation to demonstrate there are special and important reasons for granting the writ of certiorari. It is not a remedy for achieving "individual justice in individual cases." Wright, Miller, Cooper and Grossman, Federal Practice and Procedure, Jurisdiction §4004.

It is petitioner Vakas' burden to show he is presenting an important

question of federal law or an issue of national importance. He has totally failed to do either in his petition.

Matters concerning public health and safety have long been considered to be matters of state interest. The entire purpose and tenor of the Healing Arts Act in Kansas is to protect the public against unprofessional, improper, unauthorized, and unqualified practice of the healing arts. K.S.A. 65-2801. It is the state that licenses doctors to practice the healing arts. Medical licensure is not granted by the federal government, nor is licensure of physicians and other healing arts professionals considered to be within the purview of federal government authority. Bluntly stated, there is no federal interest in who is or is not a licensed medical doctor. Medical licensure is an area wholly left to each individual state to control and administer.

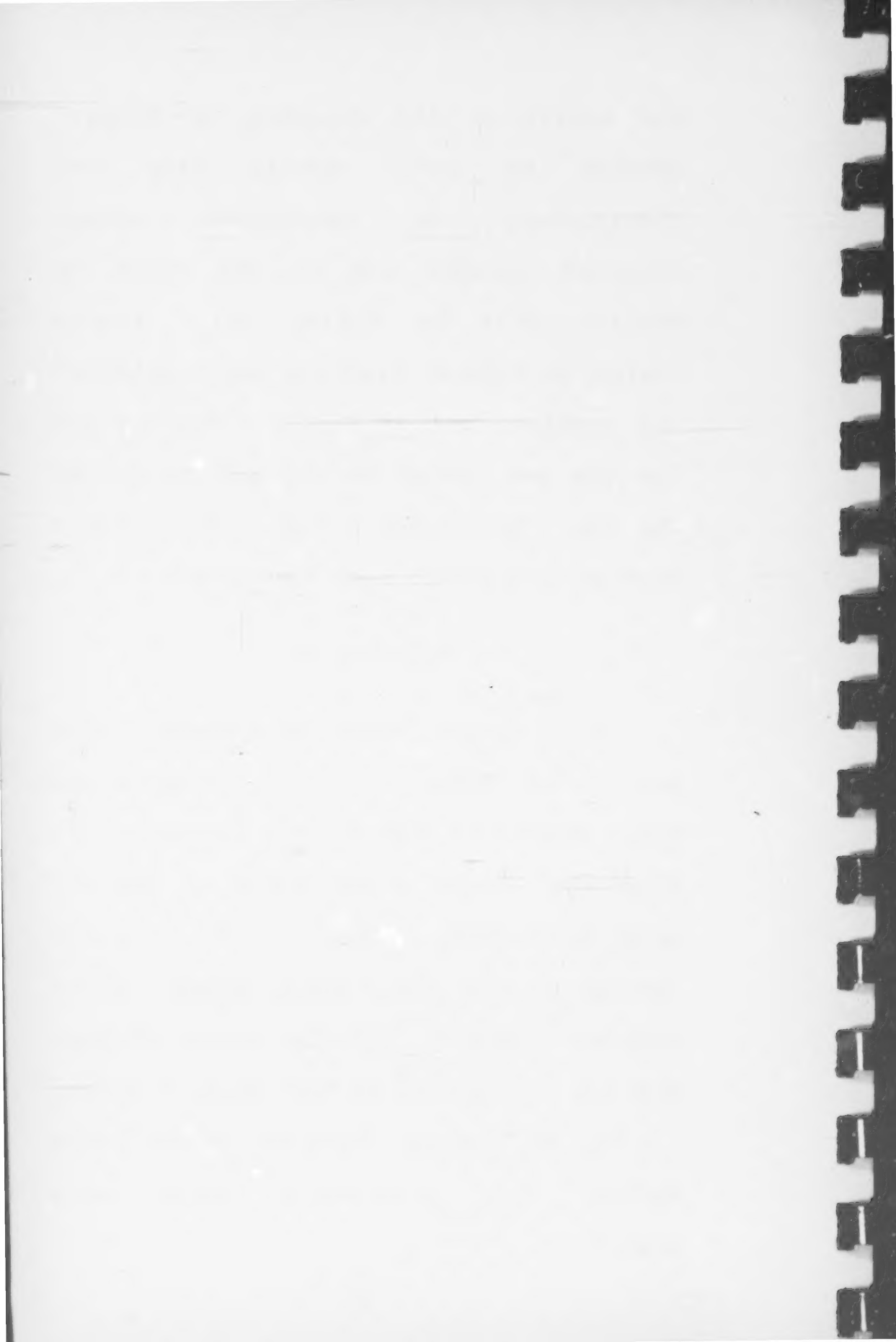
In Middlesex County Ethics Committee v. Garden State Bar Ass'n., 457 U.S. 423, 102 S.Ct. 2515 (1982), this Court held that the state of New Jersey has an extremely important interest in maintaining and insuring the professional conduct of the attorney it licenses. Traditionally, states have exercised extensive control over the professional conduct of attorneys. Supra, at 4714. The state's interest in maintaining and monitoring the professional conduct of the doctors it licenses cannot be said to be less important. In fact, it can only be more important because medical doctors are licensed only by state entities, while lawyers are licensed by both state and federal entities.

If this Court allows Petitioner Vakas to maintain this action, then any medical doctor will be free to "push drugs" or do any other act detrimental to

the health of the citizens of Kansas, because he could easily stop any disciplinary or revocation action directed against him by the Board of Healing Arts by filing civil rights claims in federal district court alleging any baseless set of facts. This is not the law and cannot be allowed to become the law. Petitioner Vakas' request for a writ of certiorari must be denied.

CONCLUSION

This Court needs to remember that petitioner Vakas' original lawsuit was filed demanding a permanent injunction to stop the Kansas State Board of Healing Arts proceeding concerning the possible revocation of petitioner Vakas' state medical license; and for money damages for the violation of his constitutional rights as Kansas district court Judge Palmer had previously found were committed.

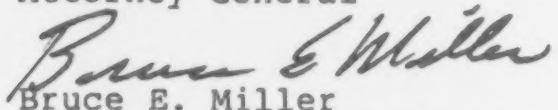


Many lower judicial bodies' (even state and federal district courts) acts and opinions are found to be in violation of constitutional standards on appeal. Their correction lies by way of appeal, not by way of suing those judicial bodies for their constitutional violations. There is simply no case here; there never was.

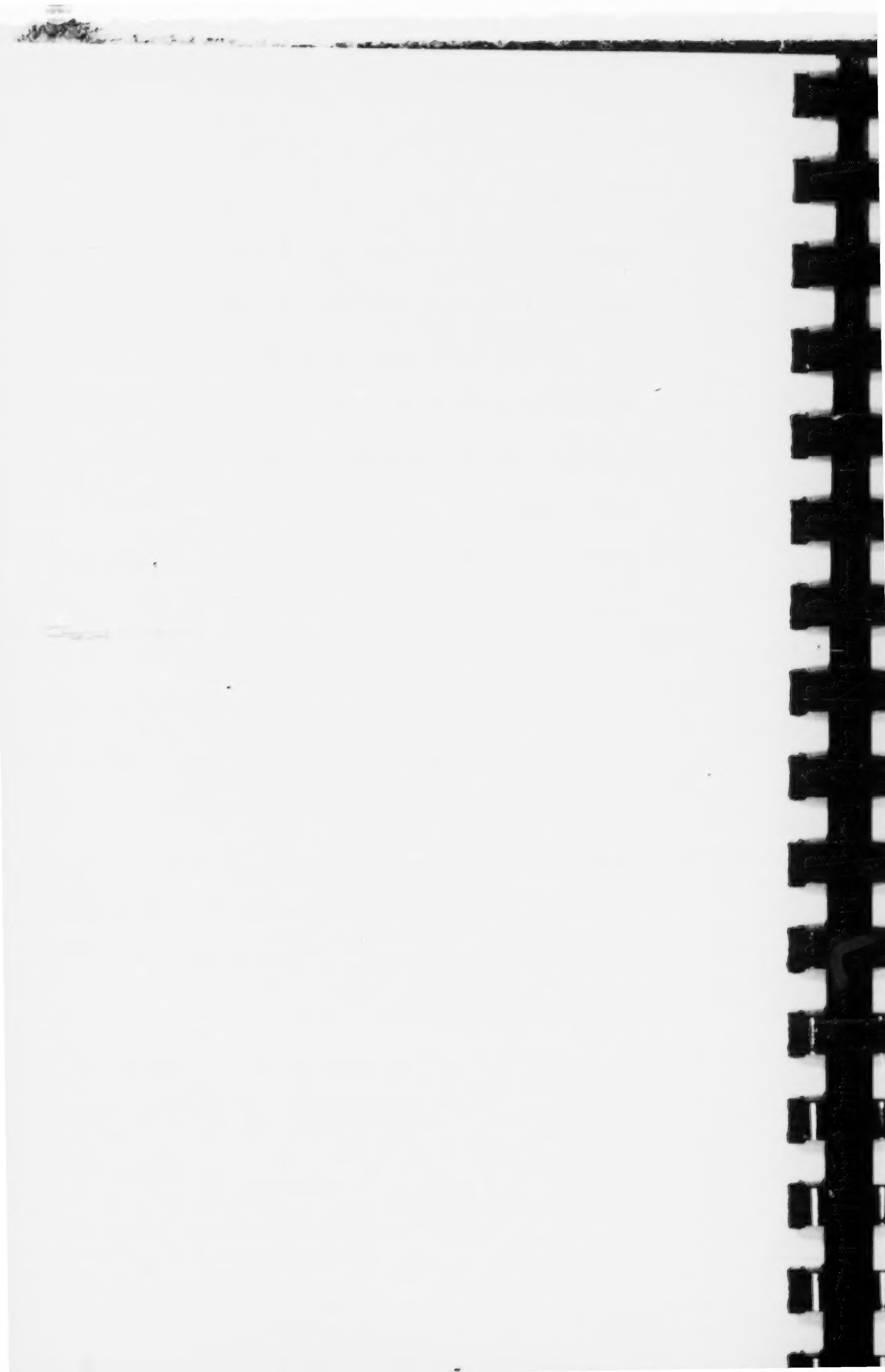
The district court correctly dismissed petitioner Vakas' case under the concepts and doctrines of the Eleventh Amendment jurisdictional bar, judicial immunity, and comity, federalism, and abstention. Petitioner Vakas' request for a writ of certiorari should be denied.

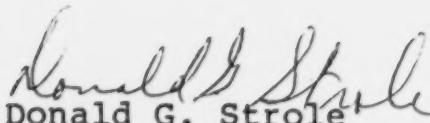
Respectfully Submitted,

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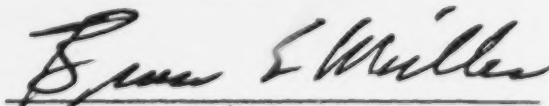

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Attorneys for Respondents

PROOF OF SERVICE

The undersigned, BRUCE E. MILLER, a member of the Bar of this Court and one of counsel of record for Respondents, hereby certifies that on the 12th day of October, 1984, he caused to be served the foregoing Brief In Opposition To The Petition For Writ Of Certiorari, together with Respondents' Appendices A Through I, on Petitioner in this appeal, by mailing five (5) copies thereof by ordinary mail, postage prepaid, addressed to his attorney, as follows: GERRIT H. WORMHOUDT, Fleeson, Gooing, Coulson & Kitch, Suite 1600, 125 North Market Street, P.O. Box 997, Wichita, Kansas, 67201, Attorney for Petitioner.


Bruce E. Miller

APPENDIX EXHIBIT A

IN THE UNITED STATES DISTRICT COURT
DISTRICT OF KANSAS

JOHN L. VAKAS, M.D.,
Plaintiff,

vs.

Case No. 82-1589

PAUL RODRIGUEZ, M.D., ET AL,
Defendants

TRANSCRIPT OF INJUNCTION PROCEEDINGS

On the 27th day of August, 1982, came on to be heard preliminary injunction proceedings in the above-entitled and numbered cause before the HONORABLE PATRICK F. KELLY, Judge of the United States District Court for the District of Kansas, sitting in Wichita.

APPEARANCES:

The Plaintiff appearing by and through his counsel, Gerrit H. Wormhoudt and Larry Wall;

The Defendants appearing by and through their counsel, Bruce Miller, Wallace Buck, Jr. and Leslie Kulick.

THE COURT: I regret the delay in that I was here but I forgot to notify my court reporter.

This is it is matter of Dr. Vakas versus Rodriguez, et al, which is as I would track to be the Kansas Board of Healing Arts and its members. In the recent past, this matter had come on on the plaintiffs motion for injunctive relief, and shortly prior to that hearing, the state had filed a motion to dismiss, and as I came to the bench I signalled to the parties that at least to the extent I understood the circumstances as of then, I would be well advised to listen to the board. The plaintiffs had not had occasion to brief it, and so we delayed the hearing until such time as that had occur.



Now I have had an opportunity to read and review Dr. Vakas' response to the motion, and for the most part, the state's response to Dr. Vakas and Dr. Vakas' response again to the state, the thrust of which is that you folks have fully apprised me of your respective positions. Have fully apprised me of your respective positions. While I believe I have a pretty good grasp of what is at issue here, I think it might be well that we would commence by hearing the state on its motion in a brief way, and at least if I have any additional questions or need clarification, I will ask for it. Mr. Miller.

MR. MILLER: Thank you, Your Honor. May it please the Court. I believe this case originates on two requests of the members' positions.

First of all, pleadings are a motion to dismiss. First of all for



simplification, as to the Kansas State Board of Healing Arts and as to the State of Kansas, who are named defendants in this action, those two defendants raise 11th Amendment to the United States Constitution in that these actions may not be brought against the state in Federal Court. And I believe there is long standing law cited in our briefs to that basis, that these two parties simply may not be sued in this type of action in Federal District Court.

As to the defendants motion to dismiss the individual members, there are several reasons raised. First of all, as to the damage actions that has been pled and never contested otherwise, Kansas State Board of Healing Arts is a quasi judicial body and they are seeking damages for actions done in that capacity. In that capacity, they have the right to receive full immunity whether

its called quasi judicial immunity or whether its called judicial immunity.

As to the second part of the suit against the individual members for injunctive relief, I believe the law is clear that injunctive relief will lie against--under 1983 will lie under--against individual members of a state board except for something that might bar that situation. Primarily the state relies on and the individual members rely on Middlesex and quite a string of cases prior to Middlesex both out of this district and other places invoking the concept of comity and abstention which has been long recognized by Federal District Courts, by the Supreme Court. These proceedings are very similar I think in nature to bar proceedings where an attorney, for whatever reason, becomes somewhat involved with his licensing agency and I



think the law has been quite clear for a long, long period of time that Federal District Courts should abstain from interference in something that is licensed primarily by the state in the case of attorneys; in the case of doctors I think is brought out in our brief its even more important because no one else licenses doctors, only this board that has any say on who may or may not practice medicine in the State of Kansas. Extremely important right to the individual doctor, also extremely important right to the citizens of the State of Kansas to have some qualifications for people that practice law.

Simply won't take any more of the Court's time but the doctrine of comity and abstention control in this case. Nothing raised that would even suggest that this Court ought to take any other

path other than to dismiss this action.

THE COURT: All right. Mr. Wall.
Mr. Wormhoudt.

MR. WORMHOUDT: Thank you, Your Honor. If Your Honor please, I think it might be helpful here to weed out the things that we are not trying to dispute. One, we are not trying to dispute that a quasi judicial body or its members acting in their quasi judicial capacity has certain immunities against damage claims.

THE COURT: Isn't any question in your mind but what the Healing Arts Board is indeed a quasi judicial board and that their proceedings are judicial as defined by Justice Berger in the Middlesex case.

MR. WORMHOUDT: Yes, Your Honor, I have considerable doubt about that.

THE COURT: All right.

MR. WORMHOUDT: Certainly I question whether or not this particular body is the kind of quasi judicial body that the Court

was talking about in the Butts case. And I might begin Your Honor by --

THE COURT: Butts case I have particular reference to as to the immunities that would run --

MR. WORMHOUDT: That is correct.

THE COURT: -- to that group.

MR. WORMHOUDT: That is correct.

THE COURT: Inasmuch as if it is understood that their function is a function to monitor, certify, discipline members of the medical practice, seems to me that that is a function assigned to them, and hearings are conducted in an orderly way as set out by the code, about its being duly facilitated by representatives within that community, and their purpose is indeed a state function after all; it's the medical practice with which that board is concerned. I appreciate "medical" meaning those in osteopathic,



chiropractic or medical all come within the perview of the Healing Arts Board. But that seems to me an extremely important state function. And I seriously have no problem with it, Mr. Wormhoudt. Apparently you do.

MR. WORMHOUDT: Your Honor, I have no problem whatsoever with what you have just said, not a single problem.

THE COURT: All right.

MR. WORMHOUDT: Licensing and discipline of the medical practitioners is, without question, a very important state function.

THE COURT: Then why isn't it within their perview to regulation the ethical practice of a member that in turn they have the duty to hear complaints, weigh evidence, make decisions as to the propriety of continuing that practitioner's license?

MR. WORMHOUDT: I have no problem with that statement, Your Honor, none whatsoever.

THE COURT: Is that not a judicial proceeding.

MR. WORMHOUDT: May or may not be, depending upon how in fact it's conducted. That to me is the question: Was it conducted as a judicial proceedings. And that, Your Honor, is not a question of state law; under the 14th amendment to the United States Constitution, that is a question of federal law.

THE COURT: Was that ever raised by the plaintiffs at any time until you just said it, Mr. Wormhoudt? As I say understood the plaintiff's complaint, in response to the motion to dismiss, it's been denied due process, so to speak.

MR. WORMHOUDT: That is correct.



THE COURT: Inasmuch as since Judge Palmer's decision, a something has occurred between the doctor and the board that gave rise to dispute for which he now claims violated due process but had nothing to do with the propriety of the board's right or conduct as to determining his fitness.

MR. WORMHOUDT: Your Honor, the appeal to Judge Palmer was based on due process grounds. Judge Palmer's decision reversing the setting aside the action of the board was based on due process grounds.

THE COURT: And said: Retry him, or appeal it.

MR. WORMHOUDT: Remanded it to the board, Your Honor. That's all he did.

THE COURT: Well, to do what? To hear it.

MR. WORMHOUDT: To do whatever was appropriate under the circumstances.



THE COURT: Well --

MR. WORMHOUDT: What happened was simply this: That the board decided to conduct a further investigation, received a report indicating there was no further need to process any complaints against this doctor, submitted a journal entry -- a proposed journal entry that clearly amounts to a release of any and all claims against the board.

THE COURT: You read it that way but let's say that's right. What does that have to do with their right to hear him in the first place or to amicably resolve it if they could, which they apparently thought they had?

MR. WORMHOUDT: I would like to address that question, Your Honor.

THE COURT: That's why we are here.

MR. WORMHOUDT: I would like to address that. I would like to direct your attention to how a quasi judicial body is



supposed to perform its functions as set out in the Butts case, and why under the Butts case certain immunities were allowed because of the safeguards that were built into the manner in which the proceedings were conducted in that case. And I would like Your Honor then to have an open mind as to whether or not the facts in this case would bring it within the kind of strictures that are announced in the Butts case.

What the Court said there was we think that an adjudication within a federal administrative agency shares enough of the characteristics of the judicial process that those who participate in such adjudication should also be immune from suits for damages. And the Court then goes on to set out one safeguard after another, all of which are embodied in the Federal Administrative Procedure Act, all of which have led to

professional judges of the highest quality, law judges and hearing examiners, that are available for these types of counterpart proceedings in the Federal Courts.

THE COURT: This is the state board.

MR. WORMHOUDT: Exactly right, Your Honor, and therein lies the difference. As Judge Reels (ph.) said to me, and I think every Judge on the Appellate Court of Kansas would agree: We don't have a decent kind of Administrative Procedure Act in Kansas, and because we don't have, the review procedures are in the morass and what happens before these administrative agencies is utter chaos and there's hardly an opportunity for anybody to know in advance what is going to happen in a state administrative procedure because there simply isn't any law or guidance.

THE COURT: Let me ask you this



though: You say that is so, and yet in this very case, this very plaintiff who took issue with the conduct of that procedure, had at hand the opportunity to appeal it to the District Court, had a hearing and was sustained. How can you tell me then he wasn't given a fair shake before that board or under the perview of the Kansas law and with appellate procedures to the State Court and, if he wanted, to the Supreme Court?

MR. WORMHOUDT: You have asked me two questions, Your Honor, which I think need to be separated: Was he given a fair shake before the board? Judge Palmer already answered that question: Indeed he was not.

THE COURT: All right.

MR. WORMHOUDT: Second question is, did he get a fair shake before the Court? He did. He did indeed. Now I think the question -- you have framed the real



question in this case, and I think this is where Your Honor has, I think, rushed to judgment.

THE COURT: I haven't rushed to any judgment, Mr. Wormhoudt. I just came on the bench. I came to the bench the last time to hear you on a motion to dismiss and I thought I should hear it. I have now listened to your briefs -- read your briefs, I'm ready to hear you. I'm asking questions which seems to me are of interest and should be decided by me.

MR. WORMHOUDT: All right Your Honor. Let's address the second part of your question: Did it cure the deficiencies in the administrative proceedings because in all likelihood if we get to a Kansas Court, they will be corrected there. Isn't that the issues Your Honor really has to address?

THE COURT: No. You have to convince me that there is something untoward about



the board in the first place.

MR. WORMHOUDT: I can only do it one step at a time.

THE COURT: I don't know of any at this point, why I should say there is; I guess that is something I have a problem with, Mr. Wormhoudt, because I don't know. All I know is that the District Court didn't like what they did and sent it back to to them and said: Try it again, I guess.

MR. WORMHOUDT: You don't have to guess about that. The District Court's decision is very explicit that at least five different ways they violated the man's right to procedural due process under the Federal Constitution and under the Constitution of Kansas. We don't have to guess about that, Your Honor.

THE COURT: Let me ask you this, Mr. Wormhoudt: Lets say in some hearing a somebody takes umbrage with something I



have done. They go to the circuit and they say: We agree with you. Judge Kelly, you didn't let this guy put on witnesses, didn't let him cross examine witnesses, short with him. We think you ought to hear it again. We agree he didn't get process. They send it back and I'm ready to hear it again. Is there something about the fact that I have been reversed, now been instructed as to what the law is or should be that I can't hear that case openly and objectively? I don't know why I couldn't.

MR. WORMHOUDT: Your Honor, that may very well be. On the other hand, if your remarks are such as to indicate some kind of personal interest in the case, there is a very good quick remedy available in the Federal Courts: We ask you to recuse yourself, do we not?

THE COURT: Certainly.

MR. WORMHOUDT: You almost



automatically would do so, would you not?

THE COURT: By all means.

MR. WORMHOUDT: Why is that, Your Honor, I ask? Simply because every man is entitled to a hearing before an impartial tribunal.

THE COURT: All right.

MR. WORMHOUDT: That's the essence, I think, Your Honor, of why we are here today. And I would direct your attention directly to the Gibson v. Berryhill case which raised these issues: Here the predicate for a Younger against Harris dismissal was lacking for the appellees alleged and the District Court concluded that the State Board of Optometry was incompetent by reason of bias to adjudicate the issues pending before it. I don't want to address that fact question at this stage, Your Honor; I merely want to lay the predicate for addressing it. I think you have got to let me do that.



THE COURT: I will let you have all afternoon, Mr. Wormhoudt. I'm not cutting you off. You seem to think I am. I just think I'm trying to get --

MR. WORMHOUDT: I'll be candid with Your Honor: I read the transcript of the first hearing. Seems to me Your Honor pretty well made up his mind.

THE COURT: Well, I'm sorry you did. I gave you a hearing, asking for briefs and here we are.

MR. WORMHOUDT: I said almost made up his mind.

THE COURT: All right.

MR. WORMHOUDT: I think you left a crack and I'm going to try to get through there crack. I don't think its a crack; I think its a wide open door.

Court went on in the Gibson case to say: If the District Court's conclusion was correct in this regard, it was also correct that it needn't defer to the board

nor -- and here is the key -- nor in these circumstances would a different result be required simply because judicial review de novo or otherwise would be forthcoming at the conclusion of the administrative proceeding.

Your Honor, I think now we are to the question: Is the factual predicate there that establishes some element of bias, of personal interest, of possible prejudice on this administrative board, quasi judicial agency? I think that's the fact question that has to be addressed before Your Honor can apply any of the legal propositions which have been invoked by us or by the state indeed, either way.

I would submit to Your Honor that the question cannot be simply decided on the face of the language in the journal entry. To me it's very clear what that proposed journal entry indicates, have no difficulty with it. But there are a host

of other facts that need to be adduced to support our position in that respect, Your Honor, and we expect to be able to establish beyond any question exactly what motivated the board members in these cases.

Your Honor asked the question: What did they proffer, what could they possible proffer by having a release of claims? But, again, Your Honor has, I submit, rushed to judgment that they had nothing there to lose, and I suggest to you that Your Honor is wrong, simply wrong. You lose -- lets concede they have absolute immunity, even though they do not meet the criteria, don't even come close to the criteria established in Butts. But lets make that assumption that immunity only exists while they are acting in their quasi judicial capacities. Now simply put this question to Your Honor: What happens when they go

beyond their quasi judicial function, beyond the line of duty? That language appears in Middlesex, appears in Gibson, appears in Butts. Question is not a question of law in this case, are quasi judicial officials entitled to absolute immunity? Answer to that is yes, if they are acting in there capacities as such. The question before Your Honor is -- and this is a question of fact at least -- were they acting in there quasi judicial capacities when they said: We want a release of claims before we will dismiss this action, release of claims against us personally. Is that a quasi judicial function, Your Honor? If it is, then let's -- if Your Honor thinks that is a quasi judicial function, then prosecutors and judges, administrative officers have a right to insist that somebody against whom they have brought de-licensing proceedings, whose liberty

and property, whose whole career and perhaps, in a real sense, their lives are at stake, and who have abused the hearing process, and then say: We will back off from that process, we will not pursue you further provided you release your federal constitutional rights. If you think that is a quasi judicial function, Your Honor, then I say let's stop this proceeding now, let's certify that question up to the Court of Appeals or dismiss the whole case predicated on that assumption. We think the journal entry lends itself only to that construction, but we are prepared to prove a number of additional facts which support our interpretation of that journal entry, Your Honor.

Now, I don't think you can reach judgment on that factual question at this stage in these proceedings. If you can, Your Honor, I hope you will at least let us make the proffer of all of the evidence

which we think is relevant to that particular point. I understood we would be given that opportunity and I assume that Your Honor meant it when he said it. Because if that factual predicate exists, then, one, there is no immunity at all in this case; we are not talking about immunity any longer; we are talking about acts completely outside of the proper functions of any judicial officer, quasi or otherwise. And these fact questions determine the appropriate principles of law, Your Honor. We don't dispute a single principle of law, Your Honor. We don't dispute a single principle of law that you have set forth as your view. We are in agreement with them. Question is whether or not they have relevance to the facts of this case.

Certainly there is an important state interest, as I said earlier, in disciplining and licensing professions of



every kind and character: Lawyers, doctors, whatever. The question is whether or not in this case there was an important state interest to be served after a finding that in fact there was no need to proceed further against this man if he would just simply sign the form of journal entry, which, in effect, exonerated these people from exposure to substantial liability, Your Honor, if they were acting beyond their judicial offices, their quasi judicial offices, if they were when they exacted this release. As I submit, and certainly I think any appellate Court, Your Honor, would agree, these kind of exactions amount to common law extortion, clear violations of the Kansas Misdemeanor Statute dealing with official misconduct in office, and those are simply not quasi judicial functions which enjoy the kind of absolute immunity that the Supreme Court of the United



States afforded federal hearing officers governed by the Administrative Procedure Act as set out in the Butts case. Those are not the facts in this case, Your Honor; they don't even come close.

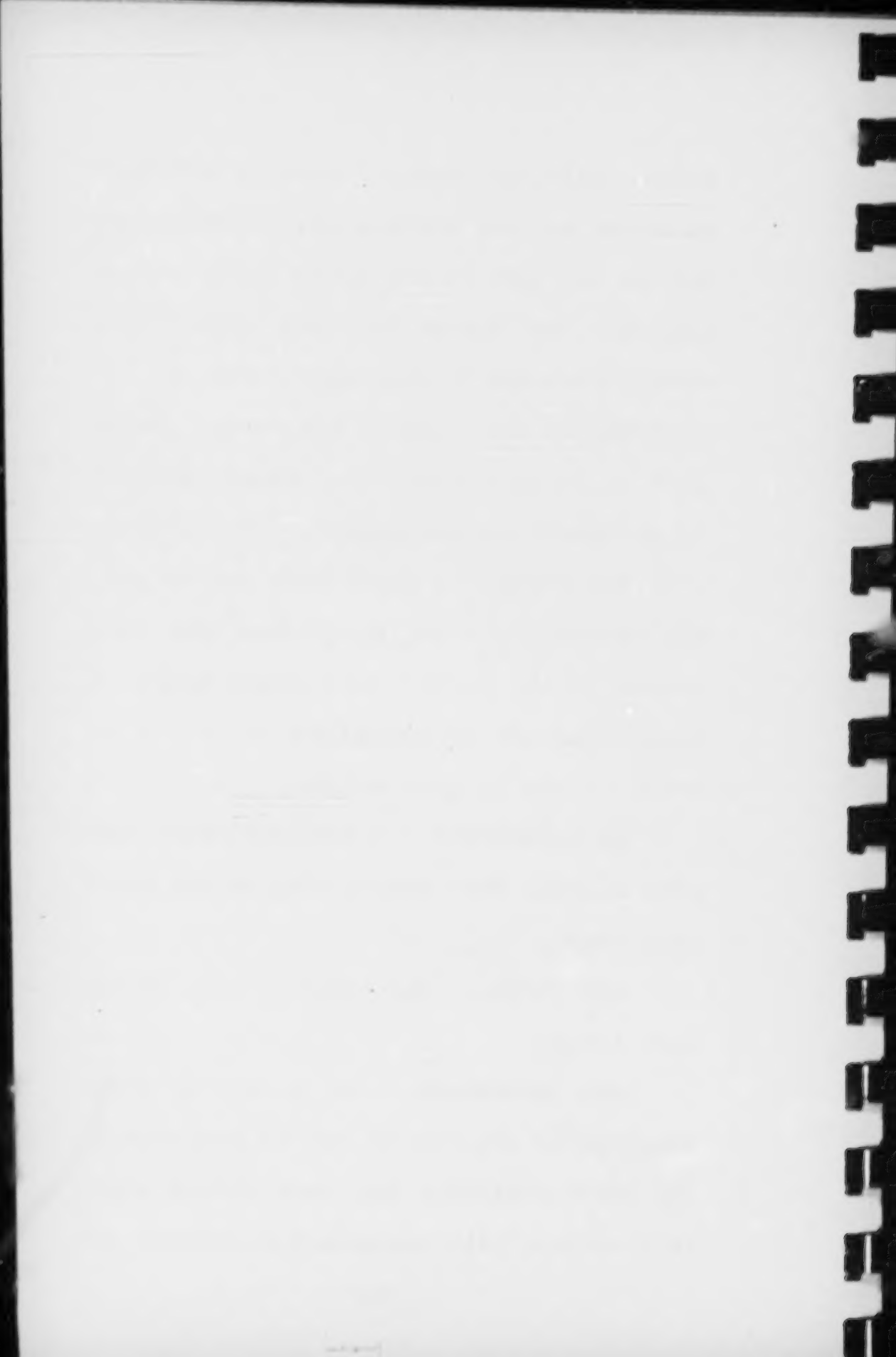
There are other important issues lurking in this case, Your Honor, which I think should be addressed.

THE COURT: I would only say to you, Mr. Wormhoudt, the first one you have raised is the first I have heard of it. I never read it or perceived it to be an issue in any of your briefs.

MR. WORMHOUDT: I thought these were good briefs, Your Honor; that is the way I read them.

THE COURT: All right. What is the next issue.

MR. WORMHOUDT: We have the whole question of whether or not in addition to the 1983 predicate for this action there is a direct 14th Amendment predicate for



this action.

Your Honor, I have messed around in this area of law enough I think to conclude this is really one of the great issues that the Supreme Court of the United States has been playing hide-and-go seek were for the last 30 years and some day they are going to have to meet it head-on. I have got pending before Judge Theis now civil rights case that's been -- let's see. It was tried in 1973. At that time school boards weren't persons under 1983. So the plaintiffs brought their action based directly on the 14th Amendment, as well as 1983. Judge Theis found that school boards were not persons under 1983 as the law then stood. He found out later of course that the law can change before a case is finally decided. And on other grounds, dismissed the plaintiffs case. Went up by them to the Tenth Circuit as a direct

claim for damages under the 14th Amendment. The Circuit took the case, Epperson against Liberal School Board, U.S.D. 480. Circuit took that case and decided it on the assumption that you do have a direct right of action for damages under the 14th Amendment. Then subsequently, of course, the Monell case came down and all became interesting theoretical law.

The Supreme Court has still put that question right out there in front as one that it is going to have to be dealt with some day. I think you can get as many different views as there are judges and lawyers on this question. I have no trouble with it myself, Your Honor. 14th Amendment says in so many words: No state shall deny any person of due process of law. Doesn't say: No person acting under color of law. It says: No state shall. We talk about 11th Amendment immunity, we

talk about common law immunity, we talk about state immunity. All of that talk, Your Honor, pertains to actions under 1983; has nothing to do with the cause of action predicated squarely under the 14th Amendment. The 14th Amendment, of course, overrides the 11th Amendment. Any kind of common law immunity or whatever maybe involved its later in time and it speaks finally on this issue.

THE COURT: On the other hand, isn't the 14th Amendment codified in 1983?

MR. WORMHOUDT: Indeed it's not, Your Honor. Indeed it is not. I submit now the Supreme Court has finally gotten around to a sensible interpretation of what that old reconstruction Congress meant when it passed 1983. 14th Amendment says no state shall deny any person of due process of law. When they said no state, however, did that also apply to school districts, apply to counties and cities?

Reason for the passage of 1983, given the benefit of a hundred years of interpretation, now is very simple. It was to make sure that Congress, in the exercise of its power afforded it under Section 5 of the 14th Amendment, intended to go beyond the amendment or clarify the amendment as need be. That these state instrumentalities or subdivisions or municipalities or whatever you want to call this, as well as the state itself, were obligated by the constitutional strictures which the amendment said applies to the state. Amendment speaks for itself: No state shall deny any person of due process of law. You didn't need a statute to cover the state question. So what that reconstruction Congress said was we want to make it clear that any minions of the state such as school district and municipalities and counties and other creatures of state

making are also bound by those same constitutional strictures that the amendment directly applies to the states.

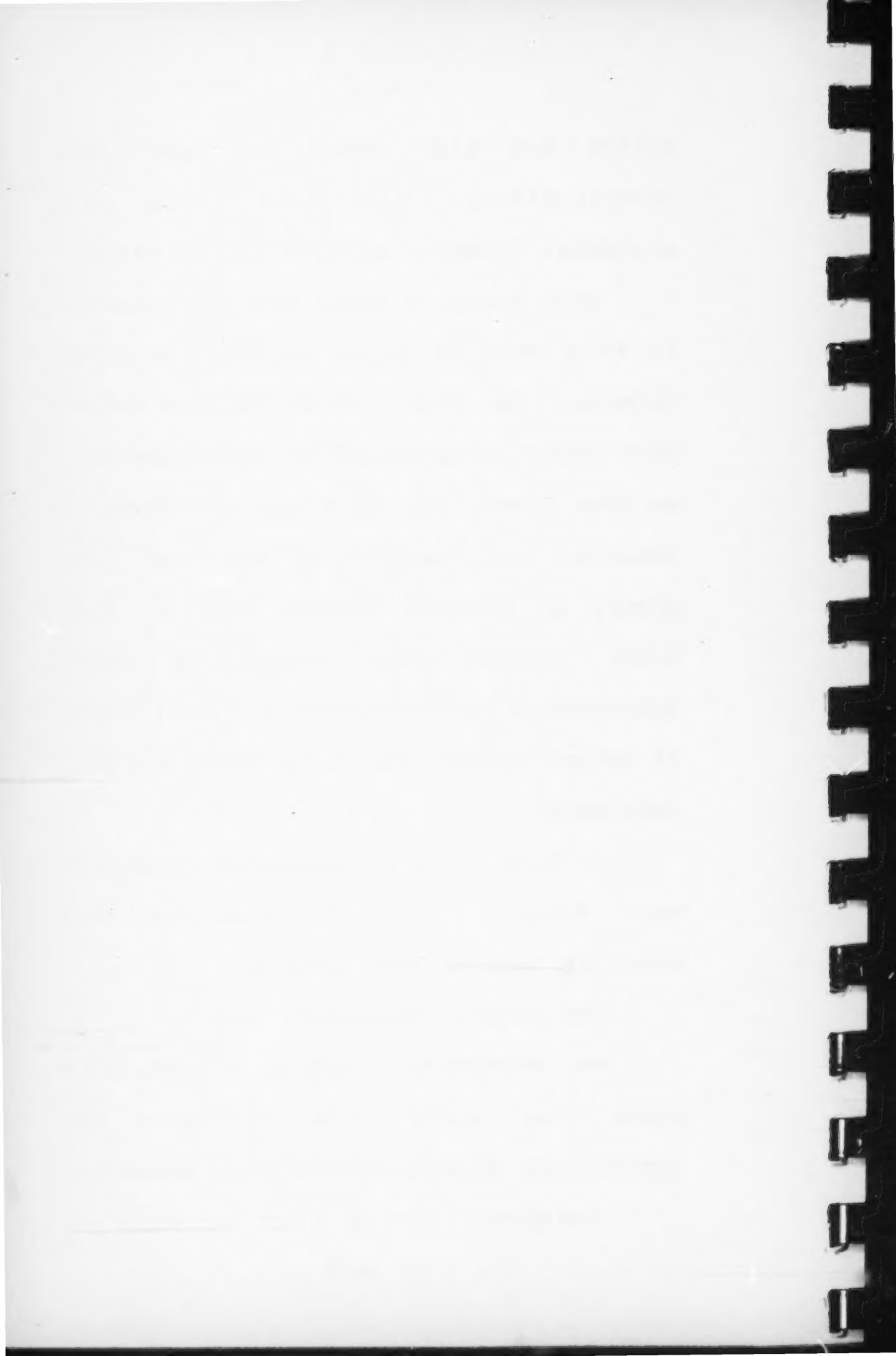
Your Honor, I think the big question in this case in terms of constitutional interest lies right there, because unless Your Honor is prepared to rule adversely on that issue, all of these questions of immunity and abstention and the like simply go out the window also if Your Honor agrees that there is under appropriate circumstances a direct right of action against the state under the 14th Amendment.

I think it's a beautiful question, Your Honor. I think it's one that deserves careful consideration.

THE COURT: Anything else?

MR. WORMHOUDT: Just as I said, Your Honor, we would like to make the appropriate proffer on the fact question.

THE COURT: Let me start out with you



as I have heard you and I suppose it must come as some surprise to you that I have carefully tracked Mr. Wall's brief, every instrument in it, read them all, all of the correspondence kthat was exchanged, all of your briefs, every case has been reseasrched and I have read several myself, from which I have at least drawn some appreciation of the issues here and what I think perhaps is the applicable ruling and decision. I would say to you that some of the things you have raised I did not perceive to be raised henceforth; I don't find them in your brief; they maybe there. I have been convinced that Middlesex is controlling. You haven't addressed it but its been suggested in your brief it's not controlling.

MR. WORMHOUDT: Like to address it, Your Honor.

THE COURT: Middlesex seems to me is quite clear. But in the course of that



decision, that trial Judge saw fit to at least listen to the grievant in those areas which he thought were areas of harassment or special circumstances, I recall. I thought as I came to the bench that was what it is you were asking.

MR. WORMHOUDT: That is one of the grounds, Your Honor.

THE COURT: All right. That was not addressed is all.

MR. WORMHOUDT: May I speak?

THE COURT: Still some state of confusion from what I really wanted to hear from plaintiff: Where is it since receipt of the decision from Judge Palmer by the board through the course of their attempts to reconcile their situation with Dr. Vakas, very failed -- where is the extraordinary circumstance or harassment that Mr. Wall had me understand the reason we are here that is so factually rank that you're entitled to



a hearing? What is it?

MR. WORMHOUDT: We are entitled to a hearing, Your Honor?

THE COURT: Uh-huh.

MR. WORMHOUDT: Before you?

THE COURT: Of course.

MR. WORMHOUDT: All right. Well, again, Your Honor, I simply put the question: If after you denied -- one of these quasi judicial proceedings -- the attempts of the person proceeded against whose life, liberty and property are at stake -- if you have denied them their request for sufficient particularity with the charges so that you can prepare a decent defense.

THE COURT: All right.

MR. WORMHOUDT: If you have denied them the opportunity for timely preparation of their case; if as I can personally testify, if there is any dispute about it, you have refused them a



continuance when counsel for the licensee is laid up in a hospital and home, and I had to do half of his work while he was, a continuance on that ground; if you have denied them the opportunity to put into evidence the testimony of some of the people whose complaints are now quoted in the brief, Your Honor, at least in summary fashion. They took the depositions of some of these pharmacists and then the very pharmacists who supposedly made complaints which give rise to these proceedings then wouldn't let their evidence in, which would have completely impeached the complaint.

THE COURT: All from which an appeal was taken.

MR. WORMHOUDT: That is correct, Your Honor.

THE COURT: Remanded back.

MR. WORMHOUDT: Right.

THE COURT: Under Kansas law and by a

Kansas Judge.

MR. WORMHOUDT: That's right, Your Honor.

THE COURT: From that moment on --

MR. WORMHOUDT: Now you are right back in front of that same board who did all of those things, who, after having done all of this those things -- and there is a host more -- then says: Let bygones be bygones and let's dismiss this case not go any further, provided you release any claims you may have against us. If you don't, however, and notwithstanding our subsequent report that says there is no further need to proceed against you, we are going to proceed against you.

THE COURT: Isn't that the hassle and harassment that you have specifically addressed?

MR. WORMHOUDT: That is correct, Your Honor.

THE COURT: What is open to hear and explained?

MR. WORMHOUDT: That's right, and we think there are all kinds of additional witnesses that can substantiate the malice, ill-will, the intentional effort to violate this plaintiff's rights.

THE COURT: Can it be ill-will if that same board in what would appear to me in an extended time frame of a year or so who now has the decision back, take stock of the situation, finds that the doctor has reconciled his practice, somewhat in concert with their directives, has agreed to a restriction on his prescriptions, all is well so far as they see and say: Well, at this time let's permit the gentleman to practice his medicine and we will shut down this hearing? Now that's what they did, and how can that same board then be the same kind of people that are so ill-willed they can't give him a fair

hearing?

MR. WORMHOUDT: Your Honor omitted one very important fact: We will do that all that provided he releases any claims he may have against us.

THE COURT: All right. That seems to be a critical difference. Is that the harassment you're focusing down to?

MR. WORMHOUDT: I'm saying you couple it with what went before it, certainly, but you can't separate what went before from the final step in the proceeding. I think we should be given an opportunity to flush those facts out in considerable detail including the whole transcript. It was a travesty in plain language. I don't think I will take second chair to you or anybody else in pride in our state courts and in our state law, but this was a travesty and it needs to be corrected and shouldn't be allowed to continue, Your Honor. It was a

disgrace to this state. As I said, I won't take second chair to you or anybody else in pride in this state and its proceedings. In most instances but not in this one.

Your Honor, Gibson case, Berryhill case, very point you're trying to make was addressed and thrown out by the Supreme Court in this foot note. They say: This Court was assured at oral argument by counsel for both parties that Alabama law provides for de novo Court review of de-licensing orders issued by the board. Nonetheless, District Court expressly found that the revocation by the board of appellees' licenses to practice their profession, together with the attendant publicity which would inevitably be associated therewith, would cause irreparable damage to the appellees for which no adequate remedy is afforded by state law.

There isn't any adequate remedy under any law, Your Honor, after a man has been tried by a kangaroo court. We are prepared to prove that is exactly what this man is faced with, as a matter of fact. That, Your Honor, I think addresses the harassment issue as well as the abstention issue.

THE COURT: All right.

MR. WORMHOUDT: Might point out that Middlesex expressly cited Gibson and Berryhill three times. Kind of illustration to which that case does not apply. Thank you.

THE COURT: I read that it clarified Gibson, Mr. Wormhoudt. What do you say, Mr. Miller, to opening this hearing for the limited purpose of hearing evidence on harassment or special circumstances?

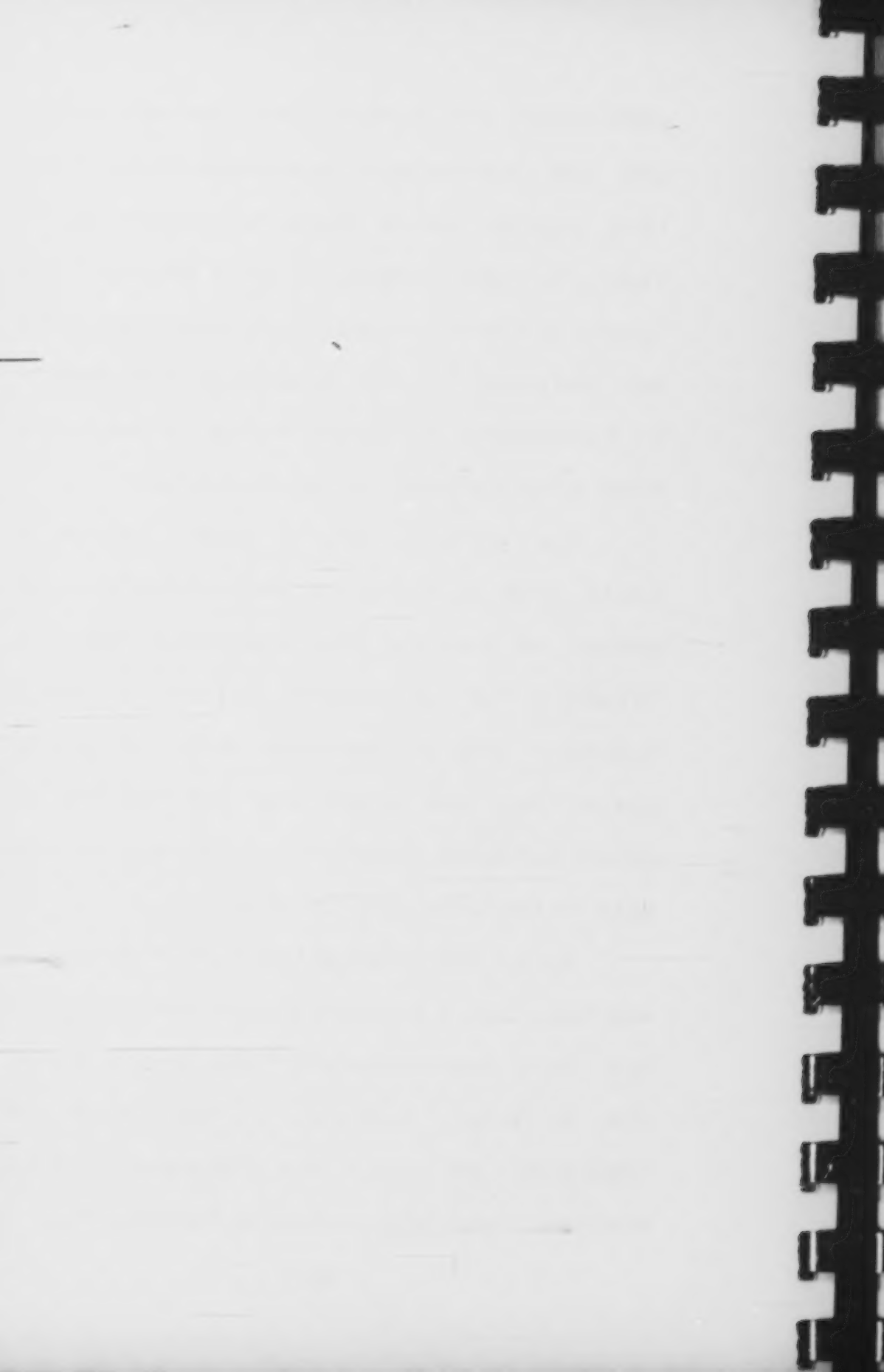
MR. MILLER: My opinion, Your Honor, is that the harassments that they are presently talking about at least that I



understand deals with that journal entry and the subsequent correspondence over that journal entry which I believe is in front of the record -- in front of the Court, I think a reading of that just does not indicate in the slightest the degree of harassment or intimidation or anything else that counsel is talking about.

Two other -- three other points I would like to bring up very quickly. My memory of reading the complaint and the pleading for injunctive relief, I don't remember any allegations ever being in there that the board was not acting in quasi judicial function during any of the acts taken anywhere in this.

As to the allegation that there's no way they could receive a fair hearing, its now been approximately two years since the original hearing. The board is composed of thirteen members; five members head the original complaint, I



believe. There has been a change in that particular board and its composition and makeup. I believe the statute require only three members of the board to actually hearing the complaints. My only point being odds are that the same hearing panel will not rehear this case on remand any way. And I would suggest that if plaintiff would perhaps file a motion to recuse the first hearing panel that they would probably would take that into consideration and might make very sure that none of the original hearing panel sat on the second hearing panel. There has been no allegations that the entire board of thirteen people is acting in bad faith and in collusion or conspiracy against this particular person.

As to the 14th Amendment due process argument, I believe that Judge Rogers addressed this in a separate case in this district and held that was not at least at

the present time a cause of action.

THE COURT: Against whom?

MR. WORMHOUDT: I didn't get the citation of that case, Your Honor.

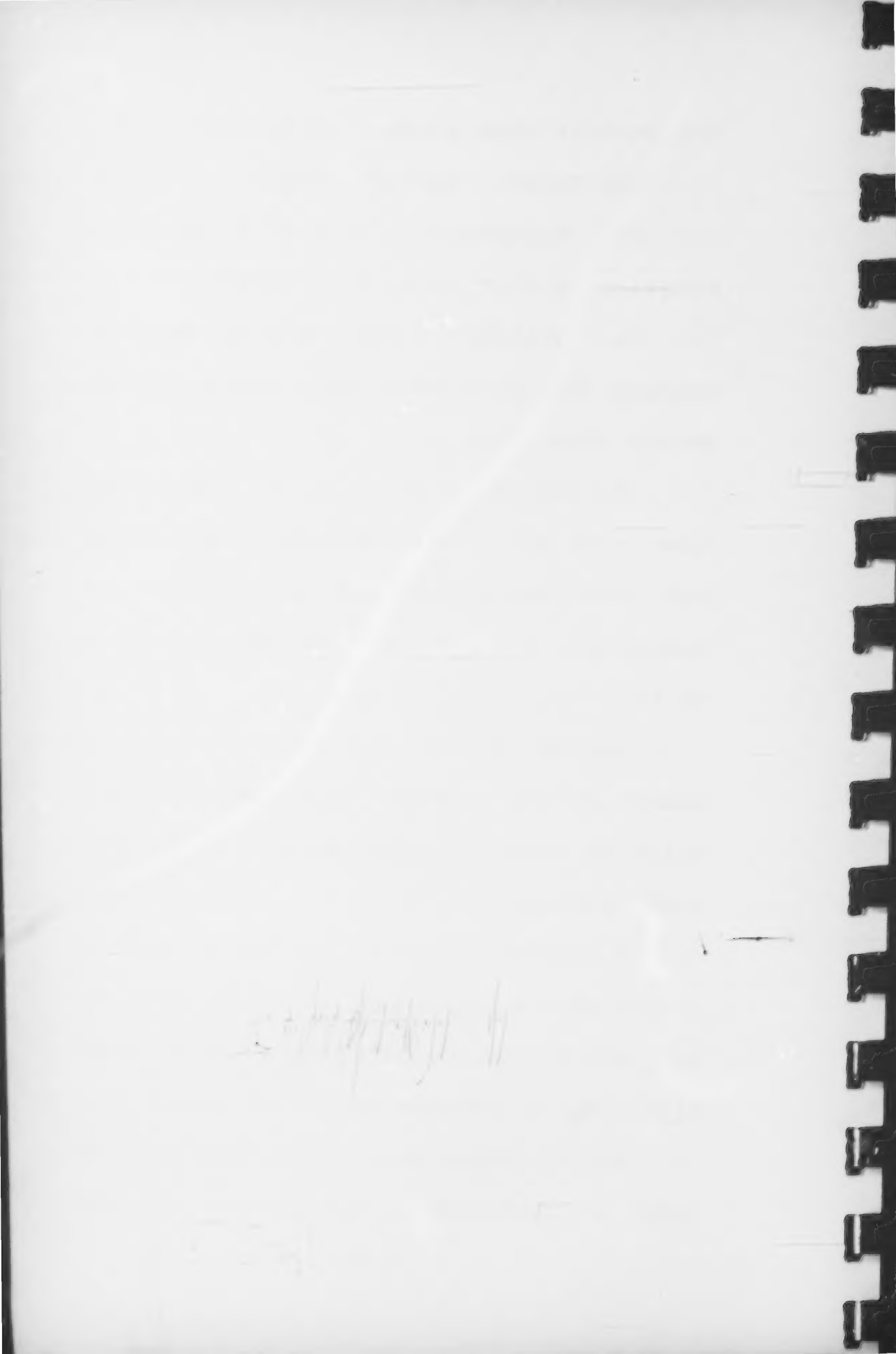
MR. MILLER: I'm relying on Les because she does much more civil rights action than I do.

THE COURT: I think all of the Judges have been up to our ears in these areas and 14th Amendment and contentions of immunity. I don't need to hear any more on it.

Let me think out loud with you a moment in the interest of tracking what I think is important and perhaps to suggest some findings:

I think it would be well that I review what I understand to be of interest and should be determined. If I have misstated it someone can track me on it.

Doctor Vakas is at this time and has been a licensed practitioner in the



medical field. It would appear that in days past, a complaint had been filed against him alleging certain violations of the controlled substance laws, prescription practice. The Healing Arts Panel or the board or the Board of Healing Arts took its upon themselves then to pursue the complaint, to hear the evidence and make certain findings. This is authorized under Kansas statute 65-2801, as I understand it. They are indeed duly impaneled and authorized by the State of Kansas to do so. As I came to this bench, Mr. Wormhoudt, I was not aware nor am I now, of any challenge with regard to that authority. It is this Court's view that it is indeed a judicial panel as Justice Berger defined it in Middlesex. I'm frank to say as I came to the bench I was not aware that a test of the due process as to those proceedings was of interest to me. Due process, as I

would understand it, either before this Court or such a judicial panel, is simply that of reasonable notice and hearing, opportunity to confront witnesses, to certainly address the issues in his own defense, before a fair and objective fact finding panel. This judicial proceeding or panel was a proceeding necessary for the vindication of an important state policy. And you have indicated you certainly agree that the functions and affairs of the Healing Arts Board are in the interest of important state policy, being the management of the medical practice.

Now this board conducted hearings and made these findings which were appealed to the District Court, and that Court, after hearing the arguments and evidence, entered its order, the thrust of which vacated and remanded the matter to the board. As I would track the order

and the correspondence, its to say that it is to be retried or et cetera where either side may appeal it but he straightened out the board so far as his findings of the absence of due process.

I see no reason as of this moment or for anything as of that point in time to make further inquiry as to the propriety of the state function and seems to me, that the exercise of the board was wholly within the perview of the state function as envisioned in that law.

What I see happens, as I track this time frame, the board does self the case back. There is deliberation within the board as to what it should and could do. In the course of that time frame, this doctor had been operating within certain sanctions or restrictions of the board.

MR. WORMHOUDT: No, Your Honor that simple --

THE COURT: Maybe I'm wrong.

MR. WALL: Yes, sir.

THE COURT: He had seemingly reconciled himself.

MR. WALL: No, that's not the fact, Your Honor.

THE COURT: May not be. It is irrelevant to the extent that it seems to me the board continued, concluded that under the circumstances as they saw it at that time he could and should continue with his practice. There were certain restrictions imposed, and he had complied with them. It seems to me that in a means or way of shutting down the file, they simply proposed a basis for disposition, which included suggestions that the controversy had been amicably resolved. Now whether that's a something that flows through this Court by lawyers in journal entries or whether its the verbage of an attorney in behalf of the board, or whether any other reasons went into it,



what they said is that the parties are desirous of concluding these proceedings by accepting Judge Palmer's decision, not requesting that either his decision be appealed or that the matter be remanded for additional administrative hearing. The parties mutually agreeing that it is in the best interest of both parties for reasons as they have discussed to conclude these proceeding in this fashion. That the parties have mutually agreed that any and all differences having existed between them are now resolved to the satisfaction of both parties, any and all issues existing between the parties hereby satisfactorily resolved.

From which a somebody suggests this is tantamount to a release and somebody is offended and strikes me somebody exercised a sense of obstinancy as opposed to appreciating what the board



had just said in authorizing this gentleman to continue his practice. That is as I see it as of then.

It is obvious to me that he takes issue with them, and in the terms of these proposals, I read in the course of this correspondence and communication that they raised suggestions of civil rights claims and damages that have somehow occurred in the course of these proceedings, threatened suit.' And any appreciation of what I have read here, Mr. Wormhoudt, an impasse obviously results by reason of of Dr. Vakas' position, when, in fact, it would appear to me that is an entirely innocuous term and a formal means of resolving this thing and shutting down the file.

It would appear to me that then as a consequence of this impasse, in time the board elects to rehear the original complaint which has always been their

prerogative and they apparently did so. As I understand it, it is presently set and as a courtesy to the parties they have agreed to pass it over at least until such time as this matter could be heard.

I can recall as I came to the bench a couple of weeks ago or whenever it was, that the timing of that hearing was of some interest and I had been assured that it would be set over at least until this Court had a chance to hear it.

Plaintiff then has filed its suit under civil rights, and seeks injunction, suggesting of the denial of due process and, in effect, that the board is estopped to proceed further. The first note I made was if you thought that this board is unfair, there are indeed procedures to request them to recuse and others step up or that they be replaced, and if that is not so, take it to the State Court and let Judge Palmer make that decision I should



think. Those were my thoughts earlier, and I see no reason why they can't.

I can only say that when I came out on the bench, certainly without any preconceived thoughts as to what I would do, but because I thought I understood the state of the law at that time, I did remind the plaintiff that I had read Middlesex. I would sale to you, Mr. Wormhoudt, that as of that point in time I'm not so sure the plaintiffs have read Middlesex as it relates to what I then said.

But Middlesex simply says that the policies underlining Younger versus Harris are such that I should abstain. Specifically in Middlesex it says that in a judicial proceeding, as I believe and have so found that the hearing of the Healing Arts Board is intended to be and I so find, and where important state interests are involved, as I believe the



licensing and the marshalling of the medical practitioners must be and is and so find, the Federal Court should abstain. Justice Berger points out that the principles of comity and federalism dictate that Federal Court abstain so that the state is afforded the opportunity to interpret its rules in the face of constitutional challenge.

Now, just seems to me that Dr. Vakas has every opportunity to preserve and to raise before that board and if he is not satisfied, before the Kansas state District Court, or the Supreme Court of Kansas, whatever constitutional question he may think of interest. I can only see from this file that he is extremely sensitive to these issues and he has fully exercised that same right henceforth in this case and has been successful before Judge Palmer, and if other questions are present, he has the same opportunity and



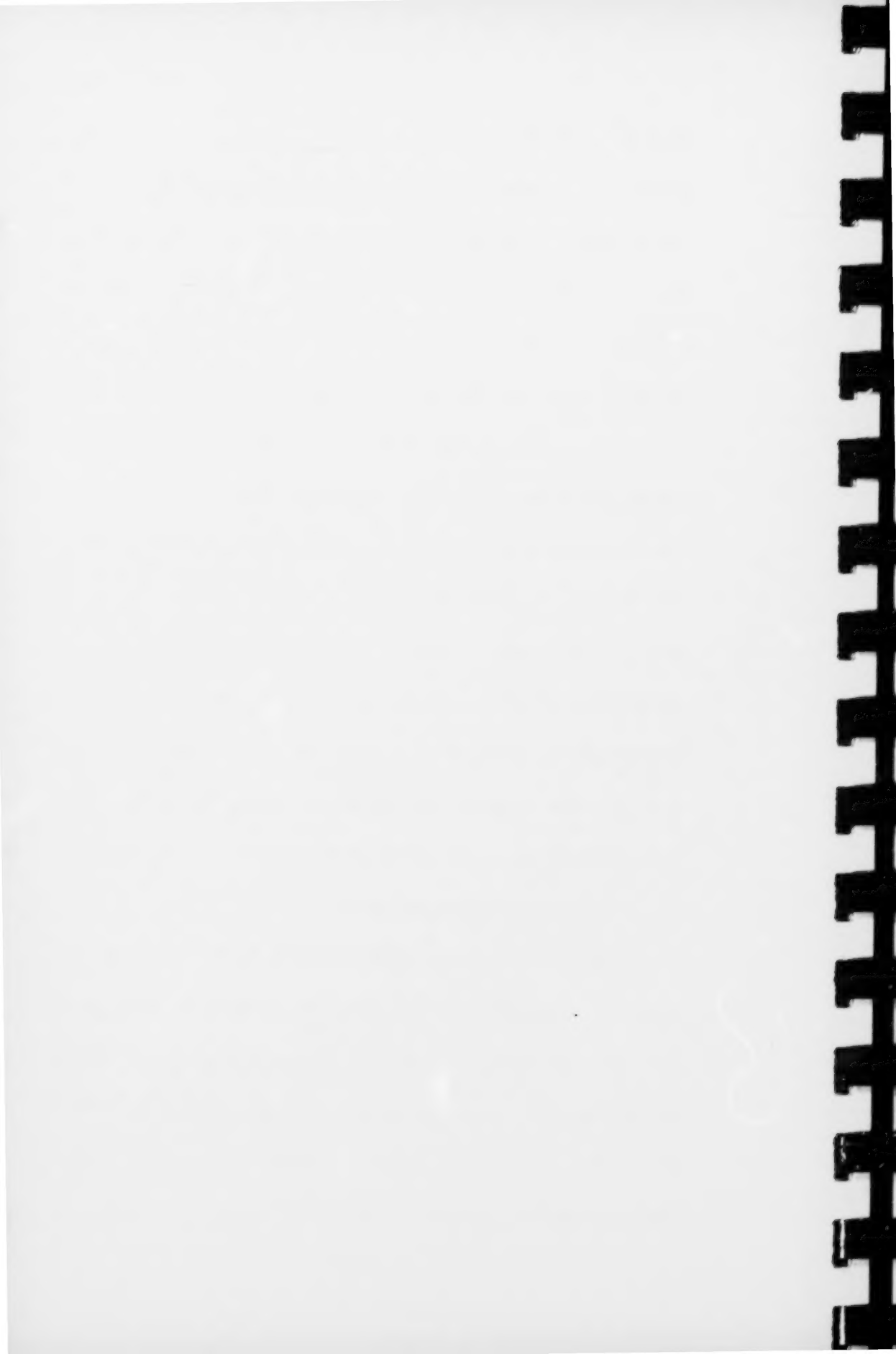
the same right to do so in the State Court. And I read Middlesex to say: Judge Kelly, that is where it should be litigated.

Mr. Wormhoudt, you prejudged everything I said or thought. I want you to know further, however, that as I read Middlesex, and frankly at the time I came to the bench, I was prepared to, that I'm also mindful that in that case that Judge read into Younger the opportunity to at least listen. I don't believe that the Supreme Court squarely addressed that aspect of the case, but I certainly believe they acquiesced in it. That trial Judge afforded the opportunity to that respondent, an opportunity to establish bad faith, harassment or other extraordinary circumstances which would constitute an exception to Younger. I don't know where it's that you read into my statement pre-judgment. You haven't been



before this Court, that I recall, in days past. I would like to think that if I have any reputation amongst the lawyers, it is that I will listen. And I will listen careful to every case and hopefully to determine each on their own merit. The problem I have had in this case is the attempt to find factually what it is you're saying. What you have tried to say I think I have ruled upon. I'm not going to listen to your constitutional questions of due process because I believe that is for the state. I will be happy to listen to whatever its you think is in the areas of harassment, or other circumstances.

Now, having addressed that thing to you in argument, you have somehow limited it to -- and I think you should -- this problem of the release. If that's what you're saying is bad faith and harassment, while I will listen to you, I



will say to you I'm not impressed at this point in time, but probably its because I really don't understand what it is you're saying factually. So --

MR. WORMHOUDT: Might I interrupt?

THE COURT: Yes, sir.

MR. WORMHOUDT: Your Honor, we are prepared to offer and would tender the entire transcript of proceedings on the original hearing. We would also want the opportunity to adduce facts to show that efforts were made to lift this man's license without even affording him a hearing at the outset. They had prejudged the case before they ever went to hearing the first time.

THE COURT: Do I understand its a different board now or partially as Mr. Miller says.

MR. WORMHOUDT: Probably some changes in the personnel but not, to my knowledge, in the majority.



THE COURT: You're not hearing me, Mr. Wormhoudt, as -- I don't think I'm interested in testing that, as I understand Middlesex. Test that with the state, take it to Judge Palmer, ask that board to recuse itself, exhaust those remedies within the state, and I think I should abstain at this time. I'm interested in knowing what its that's happened since that suggests that he can't have a fair hearing and you have said it is because he's been obstinate in not accepting some release and they are saying: Well, if that's what you're going to do we are going to hear you. Is that what you're saying?

MR. WORMHOUDT: No, Your Honor, I'm not. I'm trying to suggest that you have to tells this question of harassment and intimidation by looking at the entire course of events beginning with the efforts -- initial efforts of this board



to ask the man to surrender his license before they even gave him a hearing. We would like to tender evidence in that respect. We would like to at least make the proffer, Your Honor.

THE COURT: Well --

MR. WORMHOUDT: I don't think you can separate the beginning and the end. They go together.

THE COURT: Well --

MR. WORMHOUDT: I wonder, Your Honor, if we might have a five minute recess?

THE COURT: Surely may, but in doing so, I think you should reflect upon the fact I don't believe I will hear it on that basis. I think I have decided that that is a matter I should abstain. I think the Supreme Court is quite clear, that is a matter to test in the state and its obvious to me you have had every opportunity to exercise it. You have



prevailed. The fact that it is remanded to the same board doesn't bother me at all, and if you have a problem with that, take it to Palmer. All right.

MR. WORMHOUDT: Your Honor, there are two places to take it, of course.

THE COURT: Of course. Now, if you want to recess and come back, be fine.

MR. WORMHOUDT: May we please, Your Honor?

THE COURT: Certainly.

(Short recess.)

THE COURT: You had asked for a little recess, Mr. Wormhoudt, in the sense that I had last suggested that I appreciated what the trial Judge said in Middlesex and would be pleased to open it to hear it, but in the same breath I tried to say to you that I wanted to know what it is we are hearing. I had some confusion factually as to what amounts to harassment. Now, where are we?



MR. WORMHOUDT: Your Honor, I think it would be helpful, probably simply the proceeding if we simply made a proffer of what we would over in support of those allegations. I think Your Honor has reached certain factual judgments and conclusions without the benefit of the evidence which we sought to adduce in support of those allegations. This is of course not a motion to dismiss surely. Its under rule -- what is it -- 12, motion for summary judgment where Your Honor is addressing and resolving certain factual issues. We would like to complete the record on what we would proffer generally in support of our position on those factual issues.

THE COURT: In what areas?

MR. WALL: We have a written proffer, Your Honor, and in the areas of harassment and in the areas of conduct of the board we believe support the allegations in the



complaint.

THE COURT: Hand them up.

MR. WALL: This I will hand to the --

THE COURT: Have you shared them with the state?

MR. WALL: Yes, they have copies.

MR. WALL: I want it clear, Your Honor, this is just a brief summary of the proffer. We would like the opportunity conduct discovery and the right to present an oral proffer that will flush out any additional areas.

THE COURT: Take a minute to study this to see if its within the framework of what I would happen to listen to. This the extent of the proffer, assuming its reviewed and accepted by me and understood, Mr. Wall?

MR. WALL: I want it clear, Your Honor, that this written proffer is not the desire of the plaintiff. We would prefer to have the opportunity to conduct



discovery in this area and then to present evidence on this subject.

THE COURT: Within the area identified in the proffer?

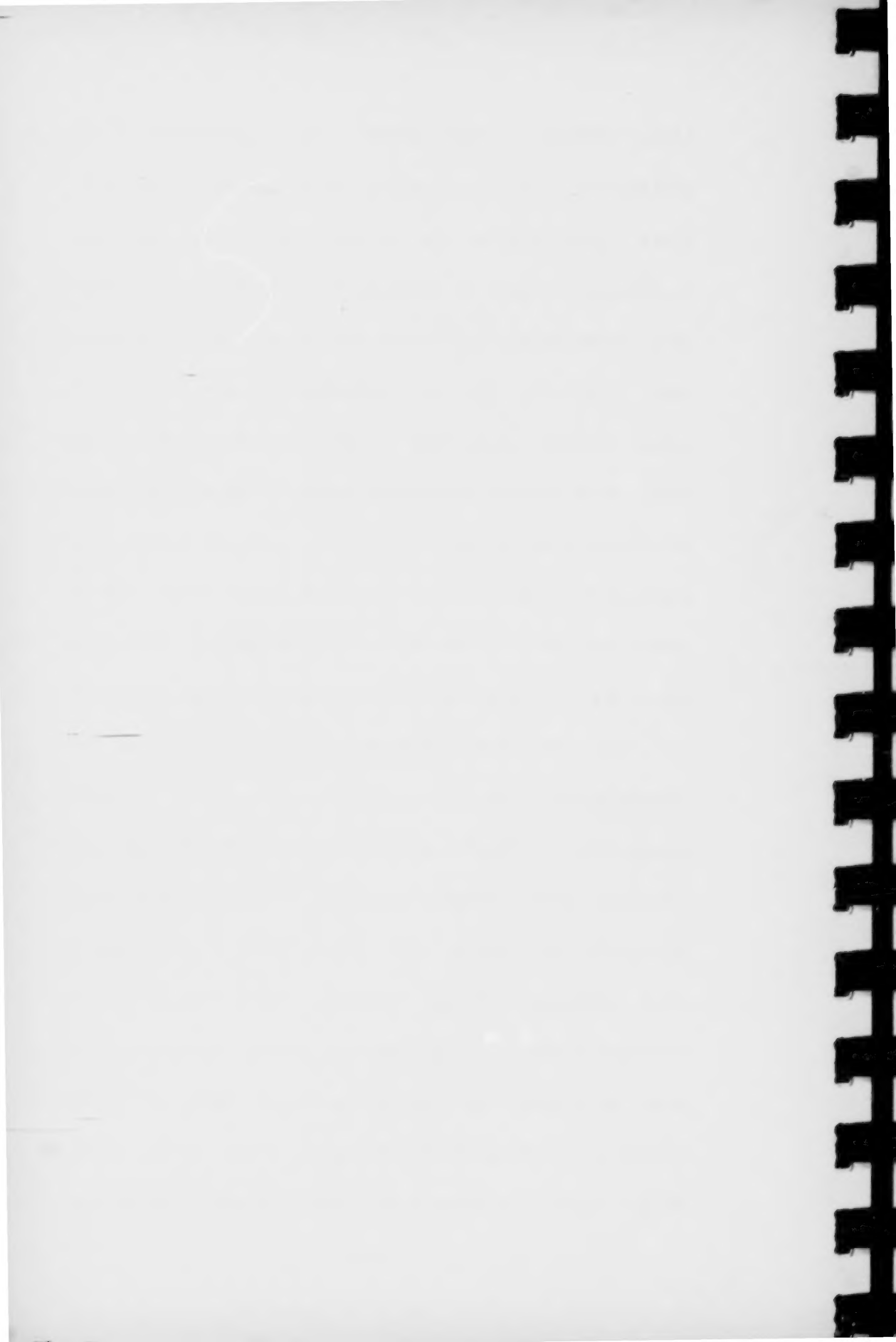
MR. WALL: Yes, except you should add the area of the original decision to charge this doctor with a petition to limit or revoke his license, the conduct of the board in telling the doctor the penalty that they were going to impose, giving him the alternative of either accepting that or facing a petition where his entire license to practice medicine would be revoked, the conduct of the board from day one up to here is really what we want to offer.

THE COURT: All right.

MR. WALL: Materials that are contained within the proffer, there is about four briefcases at our office that would need to be marked.

THE COURT: I will accept this

instrument captioned a proffer of evidence, which I said the subject matter that you have in mind to offer or to discover, and I would not hear it. And the reasons for that is that as I track the subject as is carefully set out in your brief that were the reasons for that and from which perhaps some absence of due process could be inferred. That time has expired. I would say to you that as I understand it here, the release, as you call it, as embodied in the back paragraph of the journal entry in my view is an innocuous means of resolving this dispute. That this controversy as to rights and remedies in this Court and threats of suit in this Court probably did concern that board, and if, as a consequence, it affected some judgment, I was willing to hear you. But I have always felt since getting into this case that that situation was moot, because



what I'm also ready to say that it is my judgment and I will find that the State of Kansas is immune in this case under the 11th Amendment, that the board is immune under the 11th Amendment, and each member of the board is entitled to quasi immunities from money damages as I would see it under Butts versus Economou and thus at the time of this dickering and, if you will, what I perceive to be a sense of obstinancy, they were talking about a question that makes no difference to anyone, that any lawyer ought to say to his client: You have no case for recovery of money damages under the Civil Rights Act in this Court because the 11th Amendment says you don't against the state and the board, and the Butts case is quite clear, at least as I see it, to these members in the conduct of judicial proceedings, are also immune from money damages.



But I was happy to hear it and would have, but on the strength of what I see in this case and heard from you and read in the briefs, there is no harassment that would give rise to a suggestion of the denial of due process.

With that said, I'm going to deny plaintiff's rights of injunctive relief; more than that, will dismiss this case for the reasons that the State of Kansas is immune, the board is immune, and as are the members of the board immune, period. Very well?

MR. WORMHOUDT: Very well. Your Honor, I hope that my argument was not offensive to Your Honor personally.

THE COURT: Mr. Wormhoudt, it's been a joy to have you here, and there isn't anything that you said that by any sense sense would offend me. I appreciate your argument. Simply attempting to extract some provocation from you so I could in

turn try to track what it is you were saying. I think when we finally got there I understood it and I have ruled.

MR. WORMHOUDT: All was intended, Your Honor, was to suggest that you and I might have different views and that certainly in this Court I'm wrong.

MR. WALL: If I might just add couple of statements at this time in regards to the proffer: I don't know if I understand the Court's ruling. I think I understand it being that you are rejecting the proffer and the right for us to conduct discovery and to proffer evidence on the areas that occurred before Judge Palmer's decision, is that correct?

THE COURT: Well, as I found that those subject matters discussed were related or identified in your proffer are irrelevant.

MR. WALL: All of them?

THE COURT: All of them.



MR. WALL: All right.

THE COURT: For the reasons I mentioned.

MR. WALL: Fine. I just wanted to clarify the ruling.

Second of all, Your Honor, Your Honor made a statement in regards to the hearing date presently scheduled.

THE COURT: Larry, as you recall, when this matter was first filed, it was the kind of thing that I remember you coming in and wanting a hearing as if to say that the board was to meet tomorrow or thereabouts.

MR. WALL: Within about 30 days.

THE COURT: In the course of events, you and Mr. Buck, I guess, worked out some understanding that that board would be continued from 30 days from whenever it had been scheduled and I don't know when that was, but at least at that time it is passed over a month's time beyond

whenever it was set. As far as I was concerned, I had plenty of time to come on the bench, if I was going to hear you, hear you and decide it.

MR. WALL: What I want clear on the record is that we don't know when the hearing is presently scheduled in spite of the fact that we have written to the board's attorney and asked him to identify the date of the proposed hearing.

MR. MILLER: May it please Court, I think --

MR. WALL: Could I finish?

MR. MILLER: Set for September 25th presently. If he desires a continuance --

THE COURT: Some letter identifying a time frame and I don't know.

MR. MILLER: If he desires a continuance it can be, I'm sure, obtained easily.

MR. WALL: What I would like is a stay of the enforcement of this Court's order for sufficient time to allow the plaintiff to perfect an appeal to the Tenth Circuit to see if mandamus will lie to reverse Your Honor's decision.

THE COURT: Denied.

MR. WALL: Thank you.

THE COURT: All right. I will enter a very brief order reflecting what happened here today from which you can seek such a stay if you want with Judge Logan or wherever. All right.

APPENDIX EXHIBIT B

[Letterhead of "The Prescription Shop"
omitted]

April 19, 1979

Elizabeth Carlson, Executive Secretary
Kansas Board of Healing Arts
503 Kansas Avenue
Topeka, Kansas 66603

Dear Ms. Carlson,

As concerned members of our public's health and well-being, we feel there is a problem in Southeast Kansas that needs considerable attention.

We have reason to believe that John L. Vakas M.D., Coffeyville, Kansas, through the abuse of his script-writing privileges, has helped to create a serious drug problem in our community and the surrounding area. There seems to be substantial evidence of his writing an unusually large number of prescriptions for schedule and controlled substances that would be considered by most

AB1

professionals to be "excessive" in quantity, in strength, and also in dosage. We in town have refused countless numbers of these scripts over the past few years, yet in spite of our efforts, the problem still persists. As a result, we believe that many of his patients have emerged for the sole purpose of obtaining controlled substances by Doctor's order.

We ask the Board for its advice and proper guidance to remedy this situation and ask what investigative procedures might be instigated.

Sincerely,

Concerned Pharmacists of
Coffeyville

(Six signatures.)



APPENDIX EXHIBIT C

[Letterhead of Judge Floyd V. Palmer
omitted]

October 20, 1981

Mr. Wallace M. Buck, Jr.
Kansas Board of Healing Arts

* * *

Mr. Larry Wall
Fleeson, Gooing, Coulson & Kitch

Re: Board of Healing Arts vs John L.
Vakas, M.D., Case No. C-233 I

The Court has reached the following
decision in the captioned case:

The order of the Board of Healing
Arts revoking the license of Dr. John L.
Vakas should be and hereby is set aside
and vacated. This ruling is made on the
following grounds:

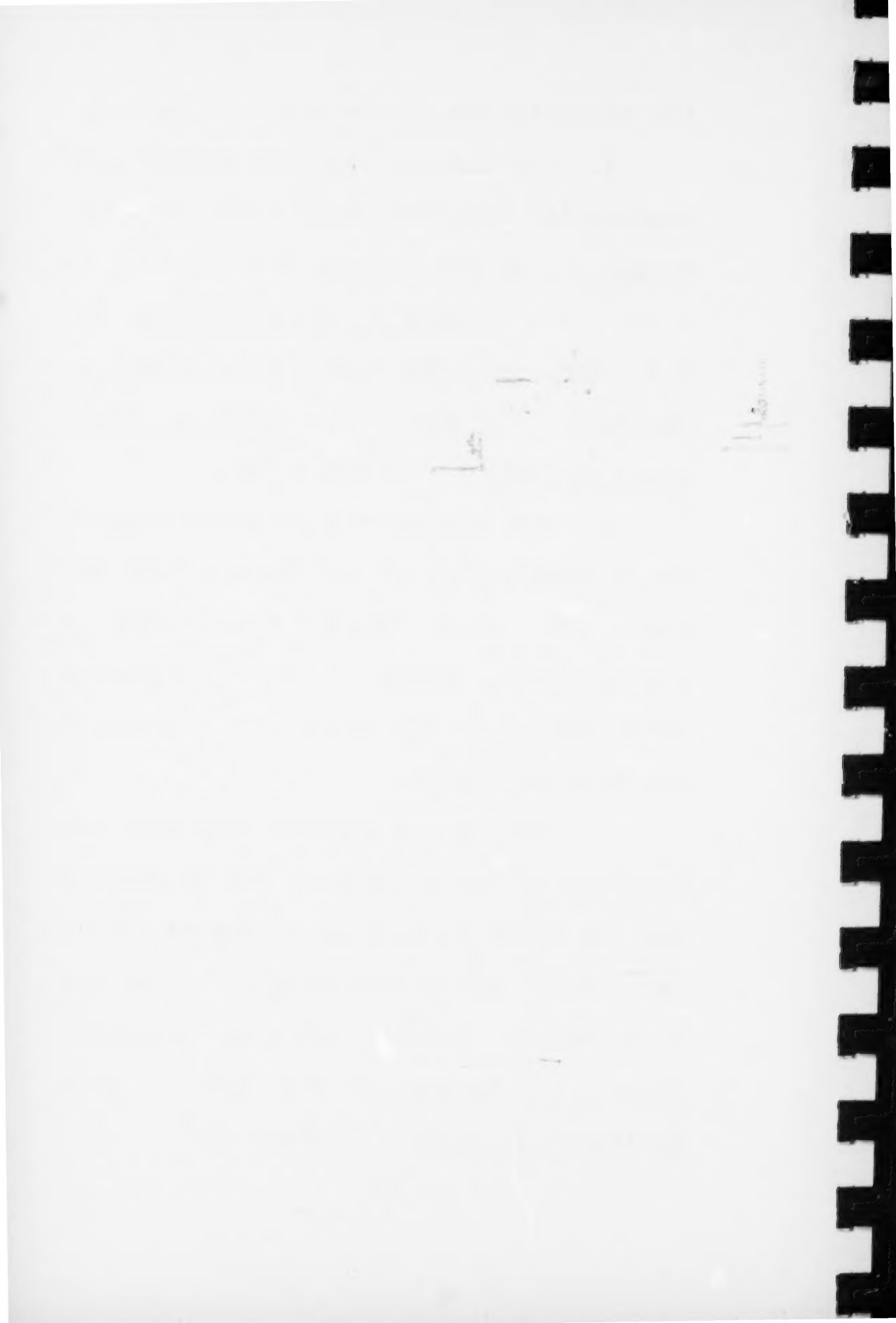
1. Dr. Vakas was denied a full and
fair hearing in accordance with minimal
due process of law as guaranteed by the
5th and 14th Amendments to the U.S.
Constitution and similar provisions of

the Constitution of the State of Kansas.

2. The charges were not stated with reasonable definiteness. KSA 65-2841, Morgan v. United States, 304 U.S. 1, 82 L.Ed. 1129; Simmons v. United States, 348 U.S. 397, 405, 99 L.Ed. 453; Adams v. Marshall, 212 Kan. 595; Rydd v. State Board of Health, 202 Kan., 721.

3. The denial of Licensee's request for a continuance on and before June 20, 1980 for good cause shown was a prejudicial abuse of discretion contributing to the denial of Licensee's due process rights.

4. The Board further deprived the Licensee of due process of law by denying him the right to produce witnesses in his own behalf and by refusing to allow his attorney to present closing argument. Adams v. Marshall, 212 Kan. 595; Winkelman v. Allen, 214 Kan. 22.



5. As brought out in oral argument, the Hearing Panel did not submit a copy of its findings and recommendations to the Licensee prior to the meeting of the Board to reach its decision in reliance thereon and the Licensee was not given the chance to appear before the Board and contest those findings and recommendations prior to the final decision of the Board, all contrary to mandatory procedure and therefore the order cannot stand.

Mr. Wall will prepare findings of fact and conclusions of law consistent with the foregoing and a Journal Entry setting aside the order of the Board entered herein.

/s/ Floyd V. Palmer
Associate District Judge



APPENDIX EXHIBIT D

[Letterhead of Board of Healing Arts
omitted]

April 28, 1982

Mr. Larry W. Wall
Wichita, Kansas

Re: Board of Healing Arts v. Vakas

In keeping with our telephone conversation yesterday at which time you inquired and I indicated to you the feelings of the Board regarding the above captioned case, may I respond as follows.

In the Board's opinion, the present status of this matter is:

(1) In or about July, 1980, the Board revoked the license of Dr. Vakas;

(2) You filed your appeal to the District Court of Montgomery County, Kansas, in accordance with the law applicable, and at the same time it was requested by you and mutually agreed upon

that Dr. Vakas could maintain his license and practice uninterrupted pending the appeal;

(3) Upon briefs and arguments to Judge Floyd V. Palmer, Associate District Judge, Montgomery County District Court, Judge Palmer did by letter of October 20, 1981, make certain findings as therein contained stating that because of his findings the order of the Board should be set aside and vacated, with Judge Palmer advising that either the Board, or for that matter the defendant could appeal his findings, or he would remand this matter for further administrative hearing and have the matter reheard;

(4) You wrote a letter to the Board on or about October 22, 1981, and enclosed therein your proposed findings and conclusions;

(5) On or about October 23, 1981, you likewise forwarded to me your letter

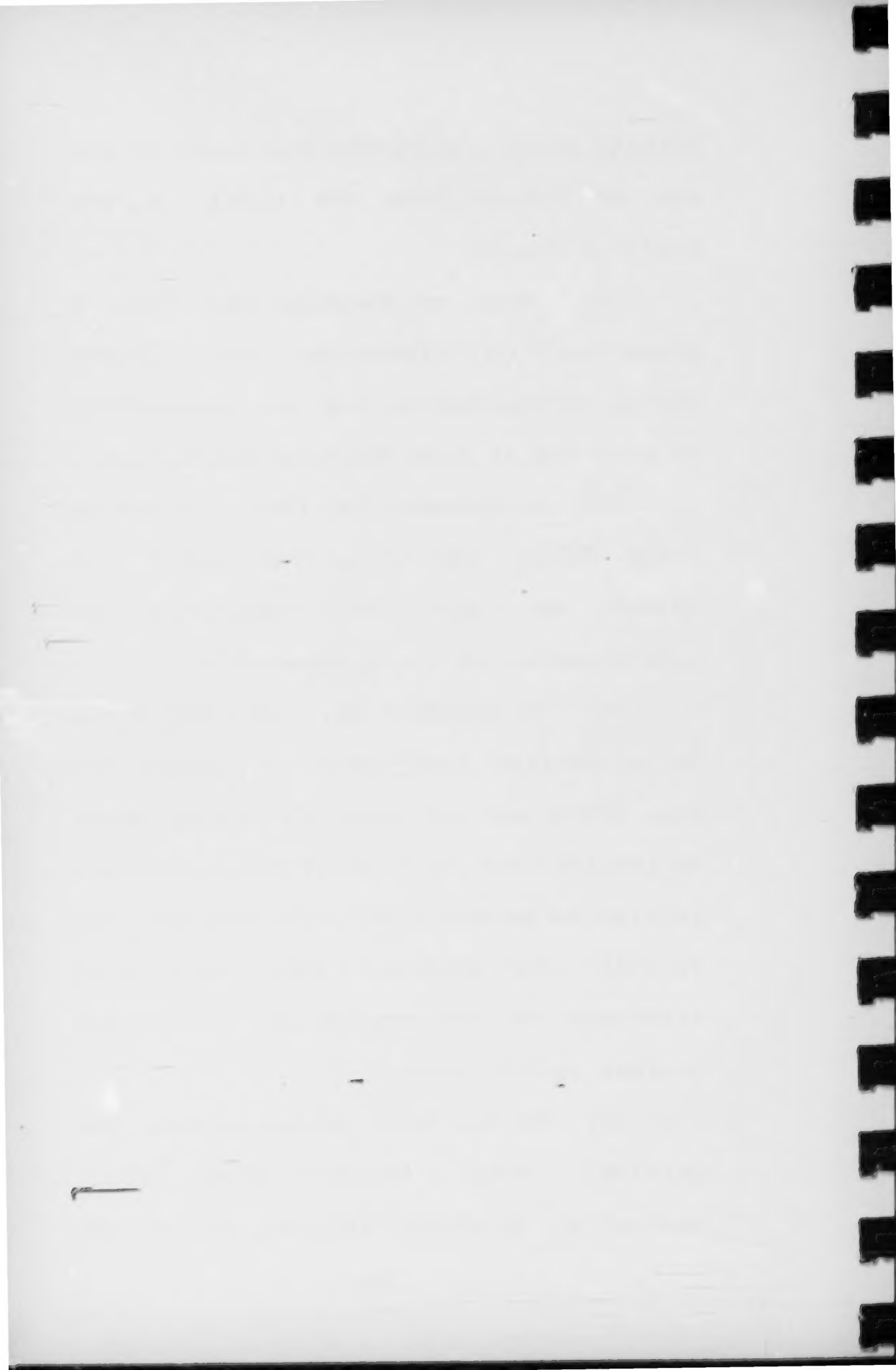
setting forth a statement for costs in the sum of \$16.00 from the Clerk of the District Court;

(6) That on November 16, 1981, I wrote to you discussing the current status of the matter and the possibility of arriving at some amicable conclusion;

(7) On November 24, 1981, I wrote to Judge Palmer indicating you and I had talked as well as discussing an understanding of his opinion;

(8) On December 22, 1981, you wrote to me setting forth what Dr. Vakas has been doing and not only discussing would be involved and required if the matter was retried as an administrative hearing, and further you enclosed some data with reference to the completion of various courses by Dr. Vakas;

(9) It has been agreed between the parties, even though some minor mechanical problems existed as to the

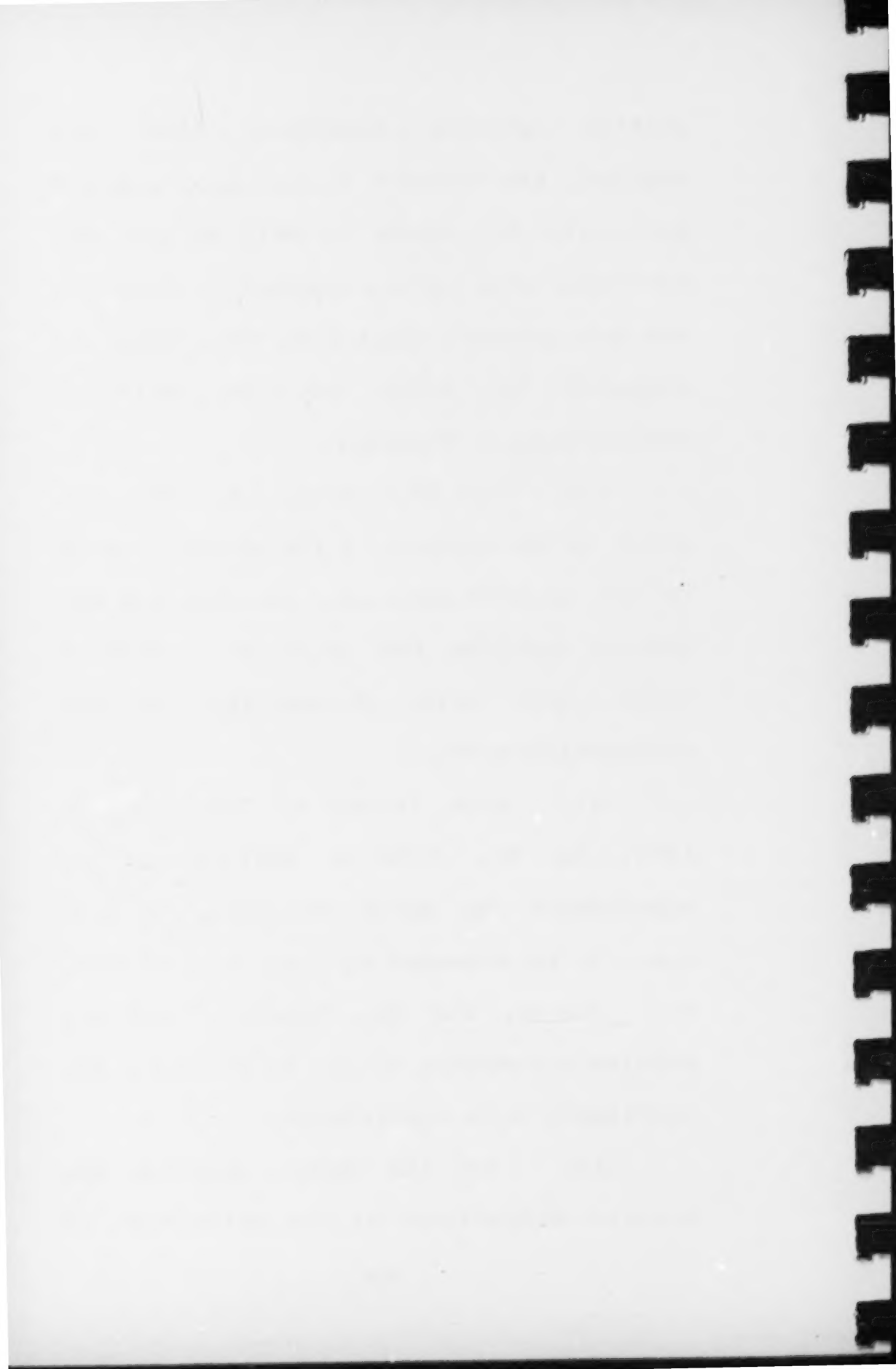


parties getting together, that Mr. McGuire, the Board's Investigator, would talk with Dr. Vakas as well as you and determine what if any changes or practice was not present regarding Dr. Vakas as compared to prior to the original administrative hearing;

(10) That on January 14, 1982, you wrote to me concerning the conference to be set up with you, your client, and Mr. McGuire and the fact that Mr. McGuire would talk with pharmacists in the Coffeyville area;

(11) Your letter of February 24, 1982, to Mr. McGuire setting up an appointment for March 19, 1982, at 2:00 p.m., to be attended by you, your client, Dr. Vakas, and Mr. McGuire; and Mr. McGuire's response to you of February 25, confirming this appointment;

(12) At the Board Meeting Mr. McGuire advised as to his activities at



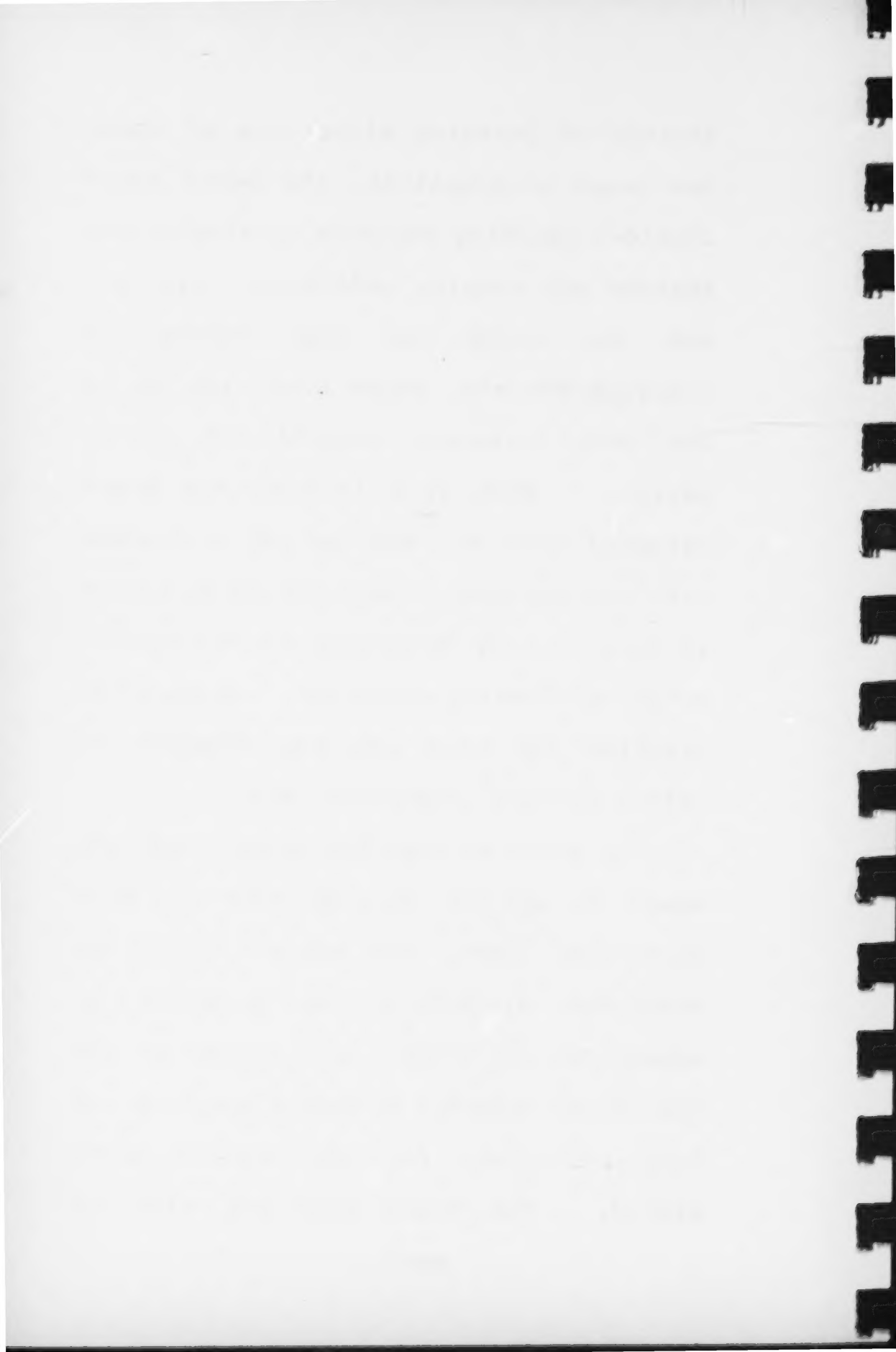
the meeting of March 19, and discussed the report he gave pursuant to that meeting, dated March 22, 1982. (As we discussed by telephone yesterday, you were of the opinion that Mr. McGuire was to furnish you a copy of his report, and in keeping with that understanding I am enclosing herein a copy of Mr. McGuire's report of March 22, 1982, to me, setting out therein the data acquired and discussed at the meeting).

The Board is aware of the two alternatives that are now present in light of Judge Palmer's letter opinion, to wit: the Board could either take issue with the Judge's findings in this particular case and file an appeal; or it could for purposes of this particular case, accept the findings of Judge Palmer and have the matter remanded and reheard to determine what should take place regarding the licensure of Dr. Vakas.



Instead of pursuing either one of these two legal alternatives, the Board could consider reaching amicable conclusion and thereby not require additional hearings, and the costs and time necessarily involved therein, which would not be in the best interests possible of either party. With this in mind the Board directed that Mr. McGuire and I discuss with you and your client the matters that we have already discussed concerning Dr. Vakas' continuing education, and what his practice has been and his attempts to review current literature, etc.

In light of what has transpired, the Board is of the opinion that in this particular case, the matter should be concluded without either pursuing an appeal or the other legal remedy of the case being remanded to have a complete and full rehearing, for the reasons above stated. The Board does not wish to



specify clearly that its action in this case applied only to this case and is not in any way to be construed adopting the procedures as stated or implied in Judge Palmer's letter opinion as being the applicable law in every case, or more specifically in any prior or future administrative hearings conducted by the Board.

In keeping with our recent telephone conversation, as well as prior discussions, I feel you and I fully understand this situation as existed, however for purposes of clarity I wish to forward you this detailed letter.

Enclosed herein please find a Journal Entry. I have signed this pleading and if it meets with your approval, would you likewise please approve and forward on for the Judge's approval and filing and ask the Clerk to please forward to me a certified copy.



With my personal regards to you, I
remain,

/a/ Wallace M. Buck, Jr.
Attorney for the Board

APPENDIX EXHIBIT E

[Caption of Case No. 80 C 233 omitted.]

JOURNAL ENTRY

On this 28th day of April, 1982, the above matter comes on for hearing. Plaintiff/Appellee appears by and through its attorney Wallace M. Buck, Jr., and the Defendant/Appellant appears by and through his attorney, Larry W. Wall, and there are no other appearances.

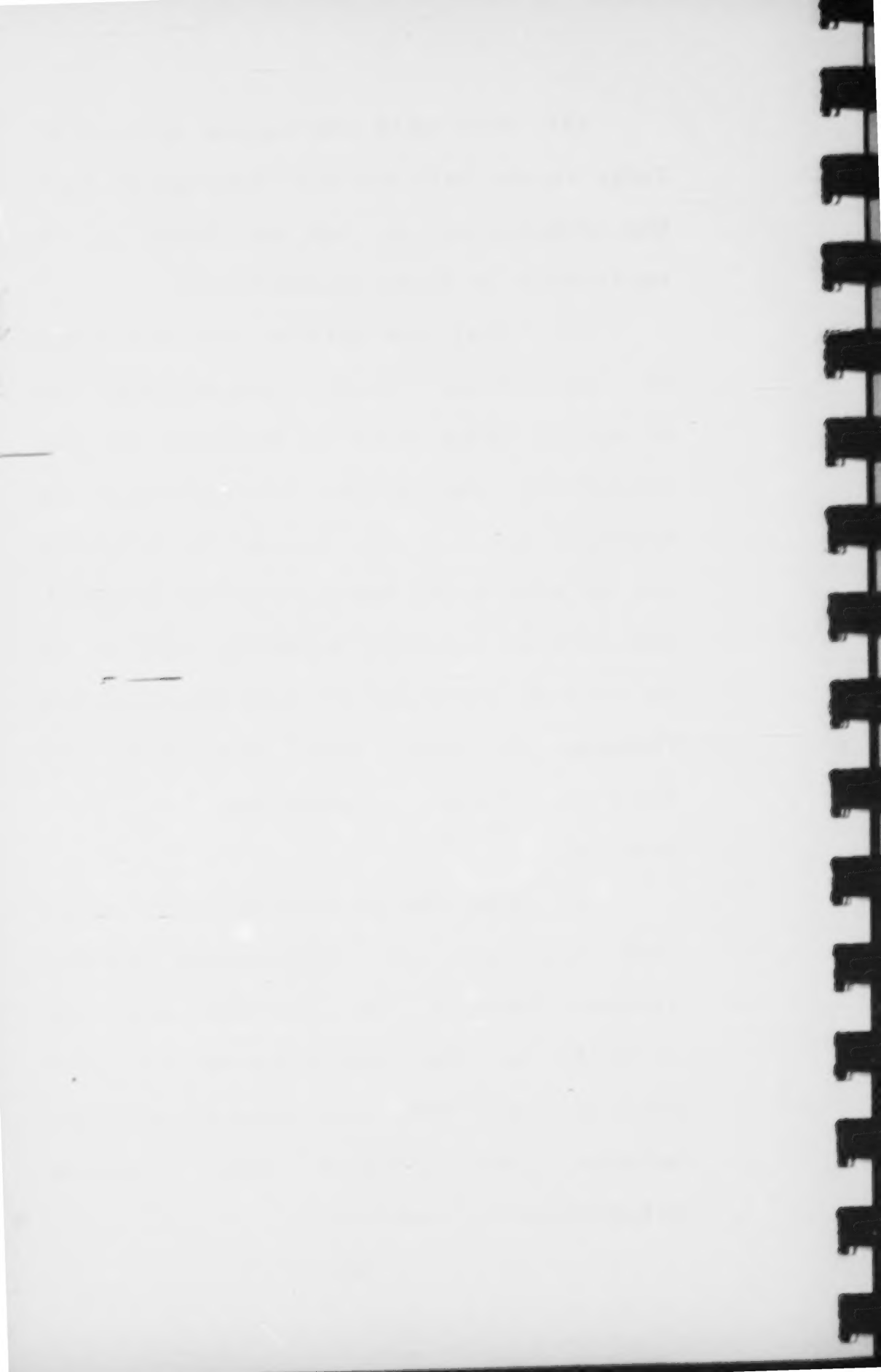
The Court being advised in premises, finds:

(1) That by memorandum opinion and letter of October 20, 1981, the Honorable Judge Floyd Van Palmer rendered his opinion herein; that a copy of said letter opinion is attached hereto and made a part hereof in its entirety by reference as though fully set out herein;

(2) That said memorandum opinion of Judge Palmer sets out his findings of fact and conclusion of law as found to be applicable in these proceedings;

(3) That the parties are desirous of concluding these proceedings by accepting Judge Palmer's decision and not requesting that either his decision be appealed or that the matter be remanded for an additional administrative hearing, the parties mutually agreeing that it is in the best interests of both parties, for reasons as they have discussed, to conclude these proceedings in this fashion;

(4) That the parties mutually agree that any and all differences having existed between the parties are now resolved to the satisfaction of both parties; any and all issues existing between the parties being hereby satisfactorily resolved.



(5) That Court costs due and owing the Clerk of the Montgomery County District Court in the sum of \$16.00 will be borne by Plaintiff/Appellee.

IT IS SO ORDERED.

[Signatures omitted.]

APPENDIX EXHIBIT F

[Letterhead of Larry W. Wall omitted]

April 30, 1982

Mr. Wallace M. Buck, Jr.
Topeka, Kansas

I am quite shocked and disappointed by your letter of April 28, 1982.

My client has again cooperated with the Board of Healing Arts as he has done throughout this matter only to find that said cooperation has resulted in an unconscionable waste of time and delay for no valid reason.

It was my understanding, and my client's, that Mr. McGuire wanted to interview Dr. Vakas so that the Board could determine if they wanted to pursue an appeal of Judge Palmer's ruling or a retrial of Dr. Vakas.

Dr. Vakas has not had any choice available to him other than to await the Board's decision. You have now indicated that the Board has decided to enter into an agreement with Dr. Vakas in regard to their decision which is totally incorrect.

Your statement that you learned on April 27 that I wanted to have a copy of Mr. McGuire's report is not supported by the correspondence between our offices and was not our agreement. I wanted a copy of Mr. McGuire's report before he made his report to the Board and I wanted to be able to be present so I could give Dr. Vakas' side of the case. I was not given the report and I was not allowed to be present at the hearing.

I enclose a copy of my letter to Judge Palmer.

/s/ Larry W. Wall

APPENDIX EXHIBIT G

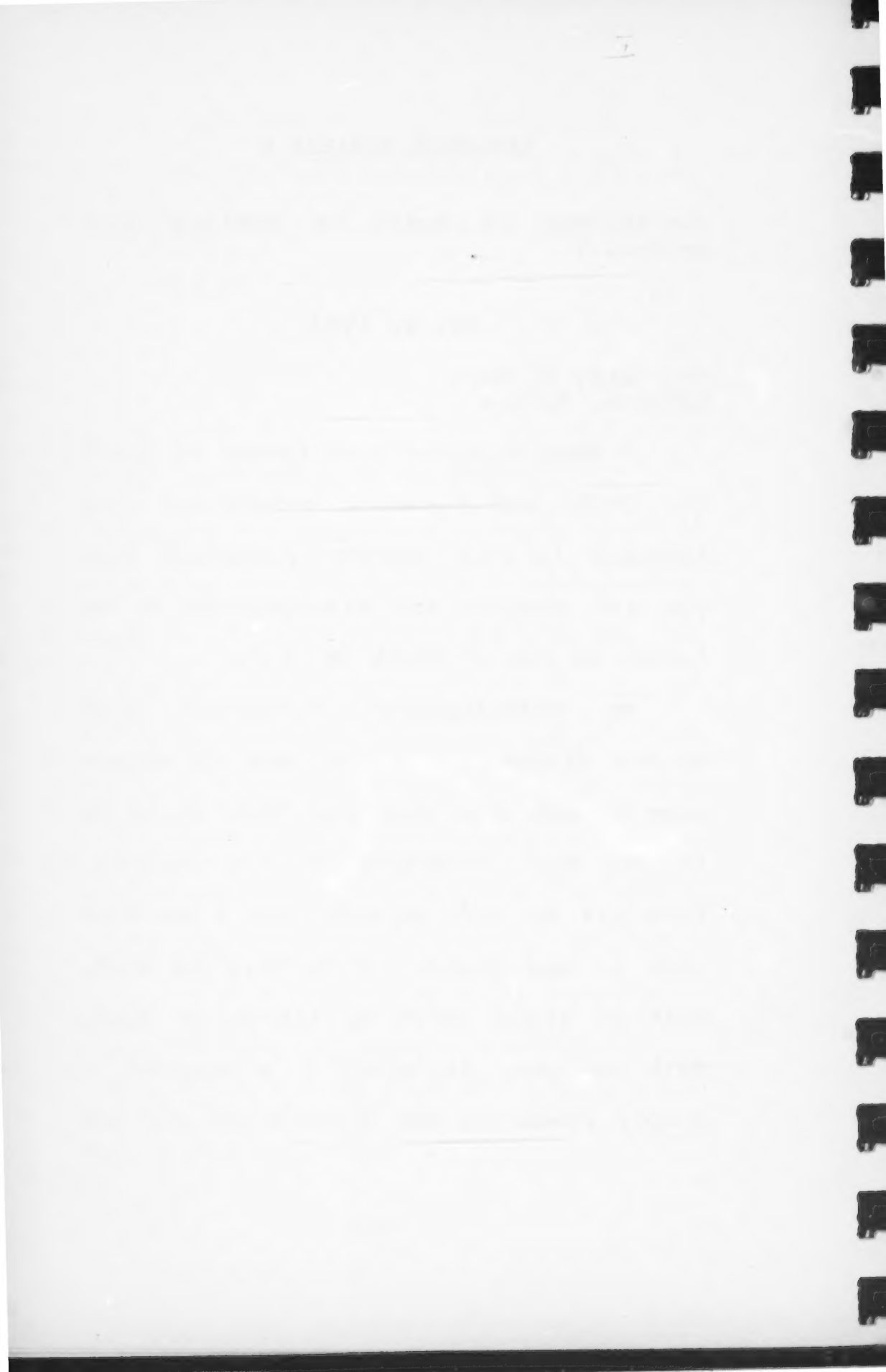
[Letterhead of Board of Healing Arts
omitted.]

May 5, 1982

Mr. Larry W. Wall
Wichita, Kansas

I have received your letter of April 30, 1982, and I cannot understand your language in your opening paragraph that you are shocked and disappointed by my letter to you of April 28, 1982.

My understanding throughout this entire discussion period was to effect some mutual understanding that would be in the best interests of all parties. This was my sole purpose and I am sure that it was yours. With this in mind, what is there about my letter of April 28th to you, in which I attempted to simply summarize our discussions and the



course of events, that bother you or you feel in some way varies from the purpose of hopefully satisfying the best interests of all parties?

Further in your letter you comment that, " . . . the Board has decided to enter into an agreement with Dr. Vakas in regard to their decision which is totally incorrect." I do not understand what you make reference to and would only comment in this fashion. The summary of events as they took place, as attempted to be spelled out in my letter of April 28, 1982, to you would seem self-explanatory.

In any event, you have made it clear in your letter of April 30, that your client in some fashion disagrees with my letter to you of April 28 as well as the proposed Journal Entry that was enclosed with that letter, and it is so noted.

I have prepared a Journal Entry and forwarded same to Judge Palmer after

having opened your letter on May 3, 1982,
and being advised that you have already
forwarded your proposed Journal Entry. I
set forth my comments in my letter to
Judge Palmer, a copy of which also
enclosed herein.

With my personal regards to you.

/s/ Wallace M. Buck, Jr.



APPENDIX EXHIBIT H

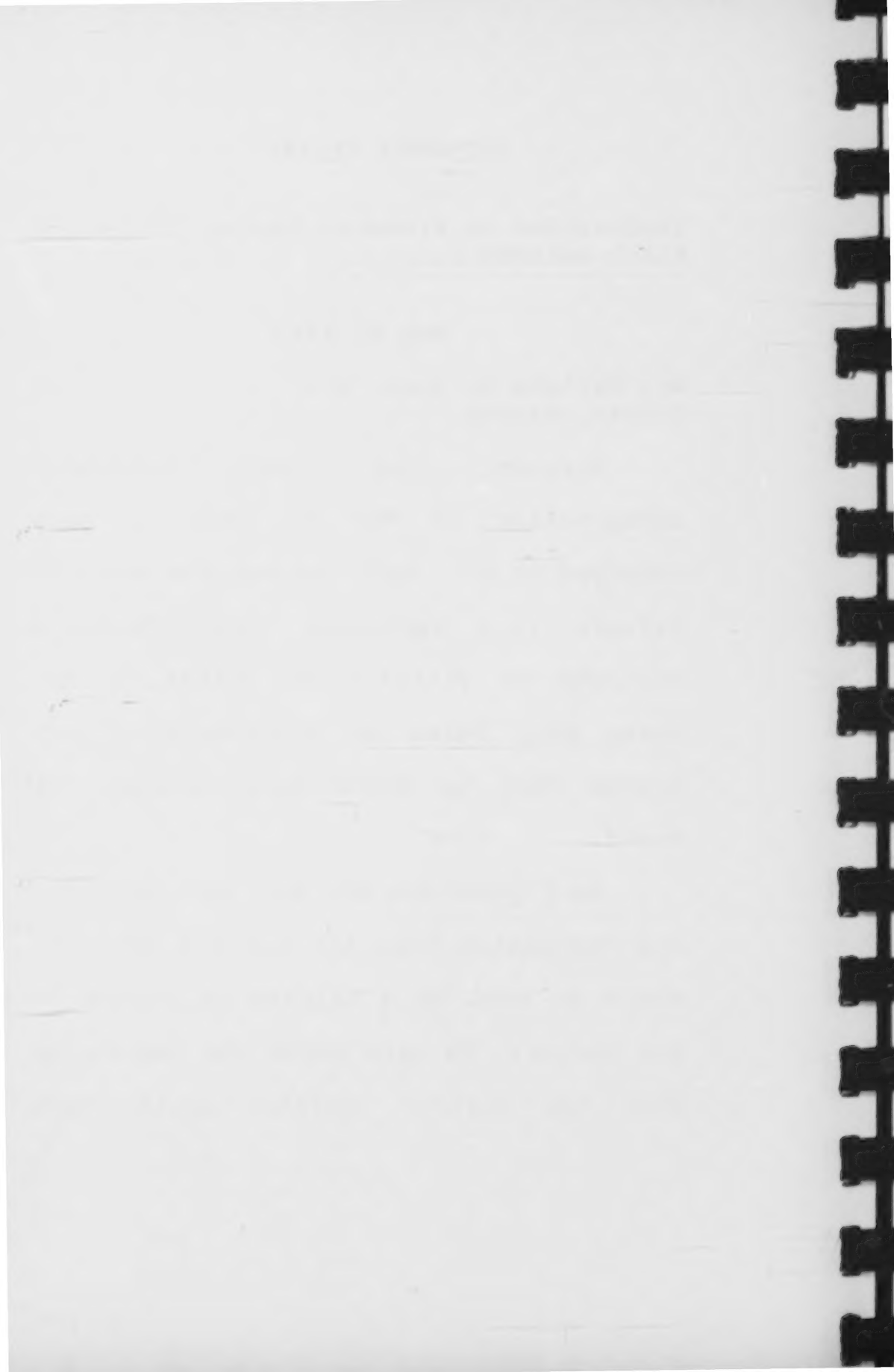
[Letterhead of Fleeson, Gooing, Coulson & Kitch omitted.]

May 8, 1982

Mr. Wallace M. Buck, Jr.
Topeka, Kansas

Pursuant to our telephone conversation of May 6, 1982, I have conveyed to Mr. Wall the Board's offer to refrain from appealing Judge Palmer's decision or retrying Dr. Vakas if Dr. Vakas will agree to a release of any claims that he might have against the Board.

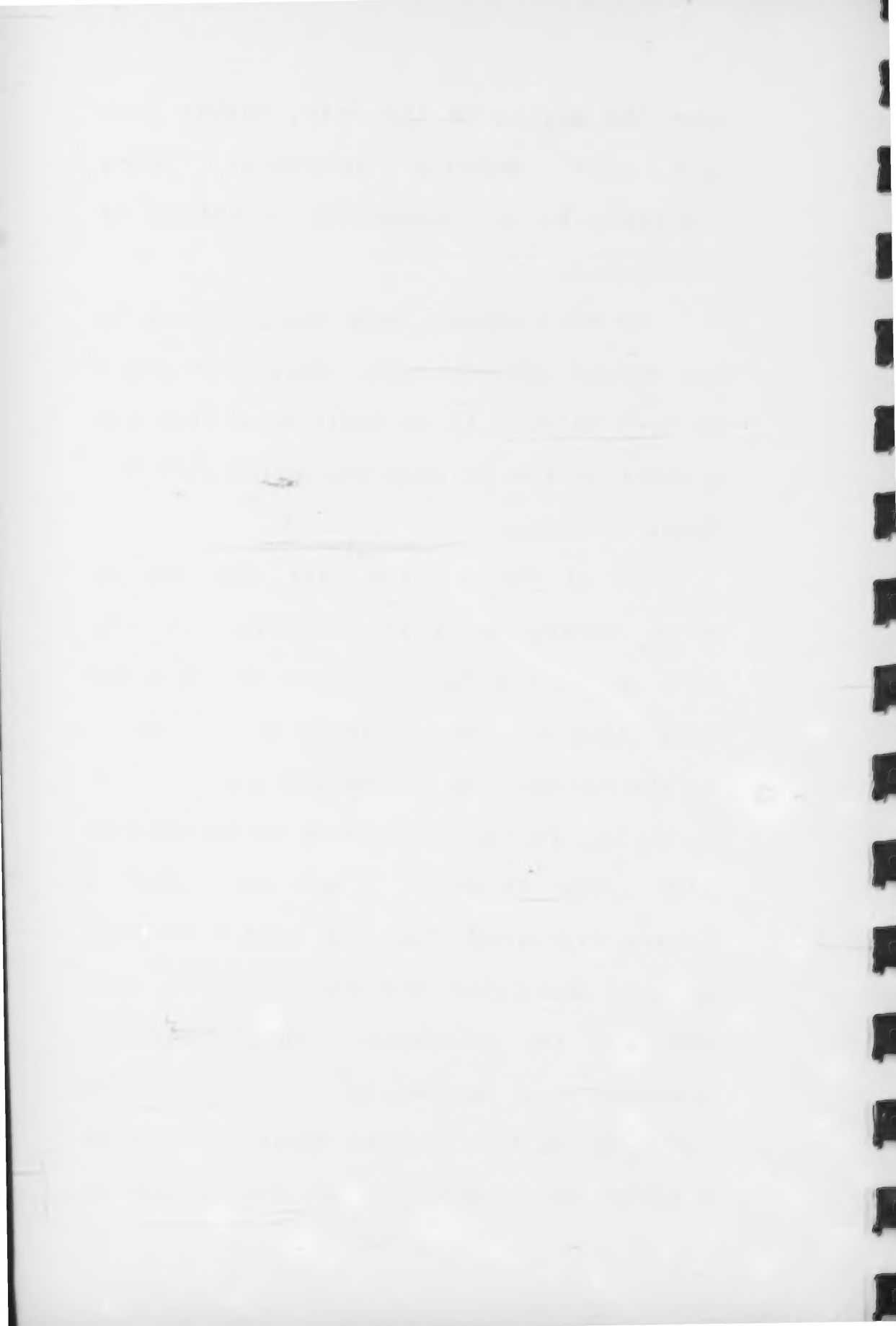
As I expected, Mr. Wall was not under the impression that the Board's decision would be tied to a release of claims by the Doctor. We were under the impression that the Board's decision would focus



upon the merits of the case, rather than upon the Board's potential legal liability to Dr. Vakas for violation of his rights.

We will convey this new position to our client and, in that regard, it would be very helpful if we could have from you a draft of the release you would like Dr. Vakas to sign.

It is our opinion that the Journal Entry should be filed regardless of the outcome of any negotiations which might take place between Dr. Vakas and the Board in the future. We assume you will include us in any further telephone conversations with Judge Palmer. I was more than a little disturbed when you indicated that you had discussed the Journal Entry with him over the telephone. If you wish to present oral arguments concerning the language of the Journal Entry, please be kind enough to alert us so that we may be



present to represent our client.

Hopefully, we can promptly conclude this matter. Your prompt attention to sending us the release will be appreciated.

If you have any questions, please do not hesitate to contact us.

/s/ Edward J. Healy

APPENDIX EXHIBIT I

[Letterhead of Board of Healing Arts
omitted.]

May 10, 1982

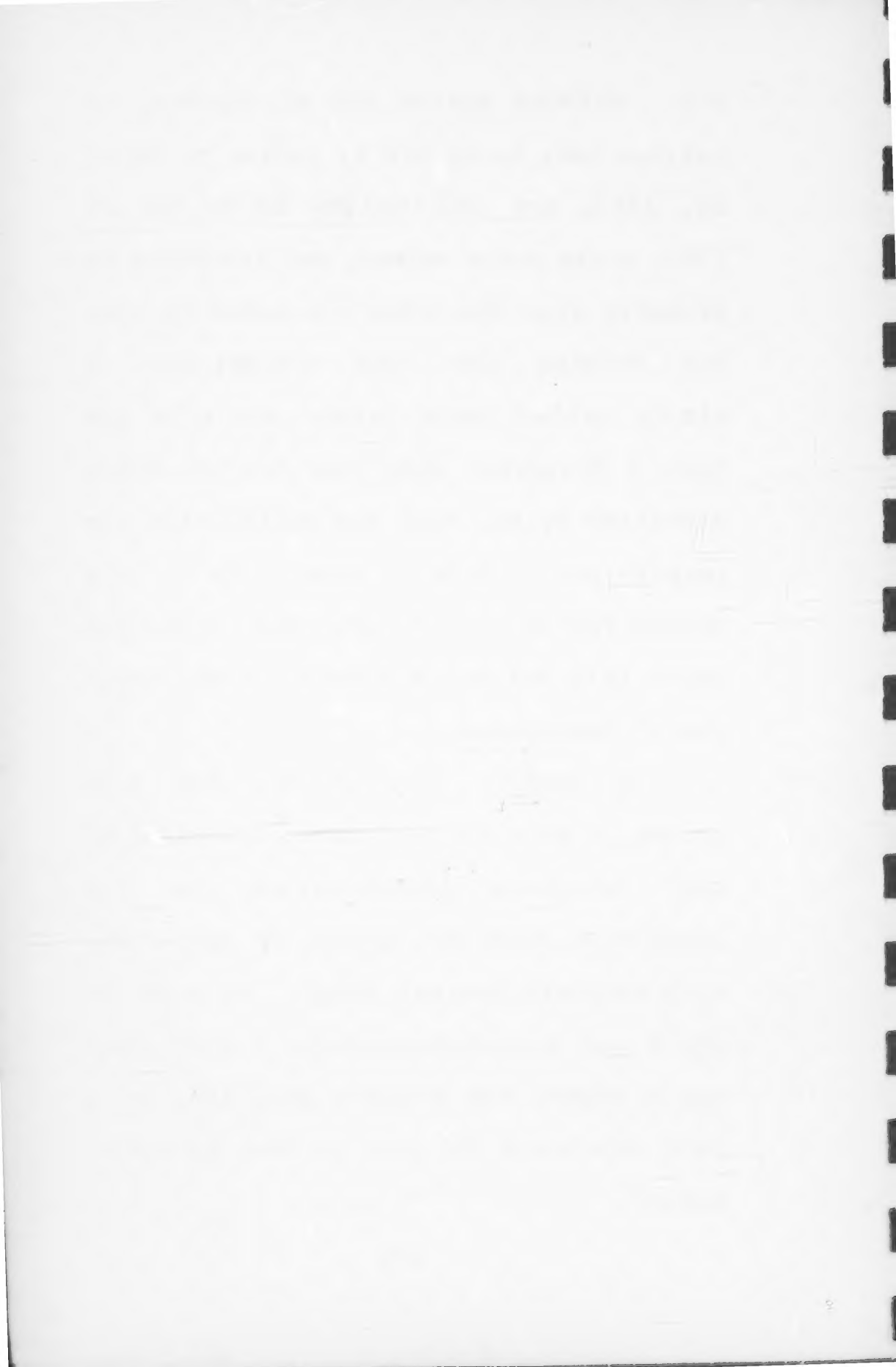
Mr. Edward J. Healy
Wichita, Kansas

I have just received and read your
letter of May 8, 1982.

I am somewhat concerned as to what it
is you and Larry Wall, on behalf of your
client, are thinking about or what your
intentions are. I just recently received
a letter from Larry indicating he was
shocked, etc., concerning this matter,
and now in your letter I read that you
state you are " . . . more than a little
disturbed . . . " In answer to your
disturbance, maybe I should indicate to
you the reason I called Judge Palmer in
the event Larry has not told you what he

did. Without asking for my approval or calling me, Larry did by letter of April 30, 1982, and received by me on May 3, 1982, wrote Judge Palmer, and asked him to promptly sign the Order forwarded to him. Not knowing what was transpiring, I simply called Judge Palmer and told him that I disagreed with the Journal Entry submitted by Mr. Wall and would, with his permission, file mine for his consideration. If you are disturbed about this series of events, I can offer you no assistance.

In reading your letter, for some reason it does not read as we discussed by our telephone conversation or in accordance with my letter of April 28, with enclosed Journal Entry. In order to avoid any misunderstanding, I will once again repeat the Board's position, as I have expressed to you, in the following manner.



Quite frankly until our telephone conversation, I was not aware that you were contemplating filing suit for whatever reasons. During recent conversations it was discussed that the matter would be closed and even in correspondence from your partner it was mentioned that the matter would be closed. Your comments to me in our recent telephone conversation reference to your contemplating filing suit, etc., was interesting commentary. Especially was it interesting in that the whole purpose, it seemed, to the efforts of both parties since Judge Palmer's Memorandum Opinion was to resolve all differences that might exist between the parties so that no need would be present to either appeal the decision or to retry it. It seemed without question that both parties, plaintiff and defendant, would benefit from this type of an understanding.

Simply following good legal practice in making sure that both parties agreed that all issues between them are terminated when an agreement is reached, I prepared and forwarded to you together with my letter of April 28, 1982, a Journal Entry reflecting this. Lo and behold, I find this was not your desire at all, but instead you wanted, apparently, the Board to do everything in order to reach an amicable conclusion, however apparently your client chose to remain aloof, not agree to anything, and at some later date if he so chose, to file suit or do whatever else he might deem to his choosing. I guess possibly this would point out how the parties were obviously were traveling in different directions.

Now that it is known of your thoughts and how you are anticipating proceeding, I think it becomes all the more important to discuss a mutual understanding of all

issues between the parties.

Rather than in language used in your letter of May 8th, may I once again state to you the Board's thoughts that precipitated my letter to you of April 28 with the attached Journal Entry. The Board is quite concerned about the merits of the case. It is fair to say that some Board Members were of the opinion the case should be retried so that a determination could be reached on the merits of the case, while others were of the opinion that it would be in the best interests of both parties if an agreement could be reached. The sole basis for the agreement was that if it appeared that Dr. Vakas had changed and was utilizing different methods in the prescribing of controlled substances, and if in light of the recent actions of Dr. Vakas not only could the Board's position be fulfilled but likewise the position of Dr. Vakas be

bettered in the eyes of the Board. Commentary concerning a release of any claims that your client might have against the Board was, as I have stated previously, not the Board's concern. Thus, the Board's intention was not to tie an amicable conclusion to anything, contrary to your expressions.

Obviously, if you are advising your client or suggesting lawsuits be filed by him against the Board, the Board cannot preclude this activity nor does it choose to interfere with whatever thoughts you and your client are exchanging or intending.

In the second paragraph of your letter, I agree with your comment and your impression that the Board's decision would focus upon the merits of the case, and I guess that this is the way we should now proceed.

In the Board's last meeting, as I

reported to you in my letter to you of April 28th, it directed that if Dr. Vakas felt the same way as the Board was feeling in that there would be a mutual benefit to both parties to conclude the above captioned proceedings by an amicable conclusion of any and all differences, all as reflected in the Journal Entry attached to my April 28 letter, then this should be accomplished. I believe I am detecting from your correspondence that your client does not choose to so agree and therefore, I will discuss with the Board if it wishes to persist or that possibly in light of your client's position, it would be in the best interests of both concerned to have the matter retried on the merits of the case, observe the procedural rules as Judge Palmer has so found, and let the decisions by the administrative body, and possible future Court Review, be rendered accordingly.

The Journal Entry I prepared and enclosed with my April 28th letter did, in my opinion, set out the mutual understanding that would be reached between the parties. However, you have taken issue with this and the only reason expressed to me was in our telephone conversation when you told me that your client did not want to agree in this fashion because he was contemplating what further action he might wish to take. There are absolutely no hidden motivations from this end, however I was very surprised, Ed, when I learned what you and your client were thinking about and contemplating.

You might send back to me my Journal Entry that I submitted to you and had signed, o r simply advise me that it was [sic] been destroyed would be satisfactory.

I assume we will proceed to having a

Journal Entry filed with the Montgomery County District Court. May I advise you also that I will seek the Board's direction with reference to whether or not it wishes to appeal Judge Palmer's decision or retry the case and once and for all obtain a conclusion and decision on the merits thereof. I am advising the Board of the discussions that we have had and your client's position.

/s/ Wallace M. Buck, Jr.

No. 84-116

Office - Supreme Court, U.S.

FILED

OCT 24 1984

ALEXANDER L. STEVAS
CLERK

In the Supreme Court of the United States

October Term, 1984

JOHN L. VAKAS, M.D.,
Petitioner,

VS.

PAUL RODRIQUEZ, M.D., WILLIAM C. SWISHER,
M.D., FREDERICK J. GOOD, D.C., BETTY JO McNETT,
JOAN MARSHALL, D.C., JULIA BARBEE, D.O., HER-
MAN H. JONES, JR., M.D., F. LEE DOCTOR, D.O.,
JERRY L. JUMPER, D.O., JAMES A. McCLURE, M.D.,
DON L. McKELVEY, D.C., GORDON E. MAXWELL,
M.D., HAROLD L. SAUDER, D.P.M., JAMES D. BRUNO,
M.D., RICHARD J. CUMMINGS, M.D., F. J. FARMER,
D.O., HELEN GILLES, M.D., DAN A. KELLY, M.D.,
RICHARD A. UHLIG, D.O., JAMES R. CROY, D.C., REX
A. WRIGHT, D.C., THE STATE OF KANSAS, and THE
KANSAS STATE BOARD OF HEALING ARTS,

Respondents.

SECOND SUPPLEMENTAL BRIEF TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

GERRIT H. WORMHOUDT
(Counsel of Record)

LARRY W. WALL

JOHN E. COWLES

FLEESON, GOOING, COULSON & KITCH

Suite 1600, 125 North Market

P.O. Box 997

Wichita, Kansas 67201

316-267-7361

Attorneys for Petitioner

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<i>Sevier v. Turner</i> , F.2d (August 8, 1984)	2, 3, 4
<i>Stump v. Sparkman</i> , 435 U.S. 349 (1978)	2



No. 84-116

In the Supreme Court of the United States

October Term, 1984

JOHN L. VAKAS, M.D.,
Petitioner,

vs.

PAUL RODRIQUEZ, M.D., WILLIAM C. SWISHER,
M.D., FREDERICK J. GOOD, D.C., BETTY JO McNETT,
JOAN MARSHALL, D.C., JULIA BARBEE, D.O., HER-
MAN H. JONES, JR., M.D., F. LEE DOCTOR, D.O.,
JERRY L. JUMPER, D.O., JAMES A. McCLURE, M.D.,
DON L. McKELVEY, D.C., GORDON E. MAXWELL,
M.D., HAROLD L. SAUDER, D.P.M., JAMES D. BRUNO,
M.D., RICHARD J. CUMMINGS, M.D., F. J. FARMER,
D.O., HELEN GILLES, M.D., DAN A. KELLY, M.D.,
RICHARD A. UHLIG, D.O., JAMES R. CROY, D.C., REX
A. WRIGHT, D.C., THE STATE OF KANSAS, and THE
KANSAS STATE BOARD OF HEALING ARTS,
Respondents.

SECOND SUPPLEMENTAL BRIEF TO
PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

SECOND SUPPLEMENTAL REASON FOR GRANTING THE WRIT

THE SIXTH CIRCUIT COURT OF APPEALS HAS ISSUED A RECENT OPINION THAT DIRECTLY CONFLICTS WITH THE TENTH CIRCUIT'S HOLDING ON THE ISSUE OF JUDICIAL IMMUNITY.

The Tenth Circuit Court of Appeals affirmed the trial court's dismissal pursuant to Rule 12(b)(6) of petitioner's case based upon the doctrines of federal abstention and the judicial immunity of the defendant Board of Healing Arts and its individual members. In petitioner's first *Supplemental Brief to Petition for a Writ of Certiorari* a decision of the Fifth Circuit was brought to the attention of this Court because of the direct conflict that decision created with respect to the Tenth Circuit's holding on the issue of federal abstention. *Bishop v. State Bar of Texas*, 736 F.2d 292 (5th Cir. 1984).

Less than a month after the *Bishop* decision, the Sixth Circuit delivered a decision that directly conflicts with the Tenth Circuit on the issue of judicial immunity. *Sevier v. Turner*, F.2d (Aug. 8, 1984).

In the opinion below, the Tenth Circuit analyzed the general rule formulated by this Court in *Stump v. Sparkman*, 435 U.S. 349 (1978), which recognizes judicial immunity for state officers acting in a judicial capacity unless there is a "clear absence of all jurisdiction." 435 U.S. at 357. See *Petition for Certiorari*, App., p. A7. The Tenth Circuit decision, however, applied the *Stump* standard only to the Board's statutory hearing procedure, without considering the true substance of petitioner's allegations: that the Board members had impermissibly

threatened the institution of new charges against the petitioner unless he would agree to sign a release of any claims against the Board and its members.

The threat of bringing charges was also the material allegation of the plaintiff in *Sevier v. Turner*. In that case, the defendants were a County Judge and his employee who undertook the practice of threatening prosecution and arrest of fathers who were delinquent in payments of child support, unless a consent order was signed. Plaintiff was coerced into signing a consent order without being informed of his right to counsel, and the plaintiff was later jailed for being in contempt of the consent order. Plaintiff filed an action in federal district court for habeas corpus relief and for civil rights injunctive relief and damages under 42 U.S.C. §§1983 and 1985 (3).

The district court granted defendants' motion to dismiss on the basis of judicial immunity. The Sixth Circuit, however, reversed the district court on the issue of judicial immunity, after analyzing the *Stump* decision and holding that:

The plaintiff has adequately alleged . . . that each of the defendants undertook prosecutorial duties that constituted nonjudicial acts.

* * *

The impending prosecutions are . . . used as leverage to extract signatures on consent orders that are approved by Judge Turner without hearings.

* * *

We hold that the defendants' involvement in initiating both the criminal prosecution and the civil contempt proceeding against Sevier, if proven, would constitute

nonjudicial acts exposing them to liability for resulting damages.

Sevier v. Turner, App., pp. A17-A18.

The contradictory holdings of the Sixth and Tenth Circuits on the issue of judicial immunity for a state entity that uses its power and position to coerce individuals to relinquish basic liberties and rights should be resolved by this Court.

CONCLUSION

The rapid succession of cases from other courts of appeals that are in direct conflict with the decision of the Tenth Circuit below demonstrates the compelling need for an authoritative decision from this Court. The Fifth Circuit has directly opposed the Tenth Circuit's holding on the issue of abstention *Bishop*, and the Sixth Circuit has directly opposed the holding on the issue of judicial immunity. *Sevier*. Petitioner asks the Court to grant the Petition for Writ of Certiorari.

Respectfully submitted,

GERRIT H. WORMHOUDT

(Counsel of Record)

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APPENDIX

RECOMMENDED FOR FULL TEXT PUBLICATION
See, Sixth Circuit Rule 24

No. 82-5758

**UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT**

FREDDIE SEVIER,
Plaintiff-Appellant,

VS.

KENNETH TURNER, et al.,
Defendants-Appellees.

ON APPEAL from the United States District Court
for the Western District of Tennessee.

Decided and Filed August 8, 1984

Before: EDWARDS, JONES and CONTIE, Circuit Judges.

CONTIE, Circuit Judge, delivered the opinion of the Court, in which JONES, Circuit Judge concurs. EDWARDS, Circuit Judge, (p. 19) delivered a separate opinion, concurring in part and dissenting in part.

CONTIE, Circuit Judge. Freddie Sevier, the plaintiff, appeals from a district court judgment dismissing this case pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure. Sevier's complaint had asserted claims for habeas corpus relief under 28 U.S.C. § 2254, declaratory relief under 28 U.S.C. § 2201, injunctive relief under 42

U.S.C. § 1983 and damages under 42 U.S.C. §§ 1983 and 1985(3). For the reasons set forth below, we affirm in part, reverse in part and remand for further proceedings.

I.

Assuming the plaintiff's factual allegations to be true, as this court must do when reviewing a district court judgment dismissing an action pursuant to Rule 12(b)(6), see *Walker Process Equipment, Inc. v. Food Machinery & Chemical Corp.*, 382 U.S. 172, 174-75 (1965), the facts in this case may be summarized as follows. Freddie Sevier, a father who is obligated to pay child support, resides in Memphis, Tennessee. Defendant Turner is a Shelby County, Tennessee Juvenile Court judge. Defendant Person is a Shelby County Juvenile Court referee who also holds the office of Tennessee state senator. Defendant Justice is a paid employee of Judge Turner and also acts as an agent of the Tennessee Department of Human Services.

Willful failure to make child support payments is a misdemeanor under Tennessee law. See Tenn. Code Ann. § 39-4-102. Sevier alleges that Judge Turner, under a contract with Shelby County, performs the prosecutorial function of collecting overdue child support payments from fathers within the county. With the aid of defendants Person and Justice, Judge Turner threatens to prosecute fathers who are delinquent on their support payments and extracts consent orders obligating the fathers to pay specified amounts of child support per week. Moreover, fathers failing to comply with executed consent orders are held in civil contempt. These fathers then are ordered to make "purge payments" or are incarcerated or both. Portions of the purge payments are used to pay the salaries of Turner, Person and Justice.

The consent orders are extracted and the civil contempt penalties are imposed without hearings before Judge Turner. Nor are fathers informed of their rights to testify, to present evidence, to confront and cross-examine witnesses, and to have the assistance of counsel, including appointed counsel if indigent.

In the present case,¹ the plaintiff fell behind on his child support payments. On July 13, 1977, defendant Justice filed an affidavit of complaint against Sevier under Rule 3 of the Tennessee Rules of Criminal Procedure. Justice represented himself to be both an agent of the Tennessee Department of Human Services and the assignee of the rights of Sevier's wife. No arrest warrant was issued under Rule 4 of the Rules of Criminal Procedure.

The plaintiff subsequently received a letter from Justice threatening the former with arrest if he did not appear in Juvenile Court to respond to the criminal complaint. When Sevier appeared on July 20, 1977, Justice did not reveal that no arrest warrant had been issued and did not inform Sevier of the right to be represented by counsel. Instead, Justice threatened to have the plaintiff arrested and placed under a \$1,000 bond if Sevier refused to sign a consent order obligating him to pay \$15 per week in child support. Fearing immediate arrest, Sevier signed the order. Judge Turner later approved the consent order without a hearing.

Sevier made the child support payments until March 1981. At this time, he again fell into arrears allegedly because his new employer did not honor a wage assign-

1. Although the plaintiff presents this case as if it were a class action, no class allegations are present in the complaint and no class has been certified. Thus, this case only involves the question of whether Sevier has stated a claim upon which individual relief can be granted.

ment established under the consent order. In September 1981, the plaintiff was served with an order to show cause why he should not be held in civil contempt. Sevier appeared on October 2, 1981 before referee Person. Person did not advise Sevier of his right to counsel, retained or appointed. Person proceeded to adjudge the plaintiff guilty of civil contempt and sentenced him to jail until he made a \$200 purge payment. In addition, Person ordered that the arrearage be paid within ten months. Judge Turner adopted Person's recommendation without a hearing.

Since Sevier was unable to make the purge payment, he spent sixteen days in jail. His employer discharged him during this time period for absenteeism. Shortly after the plaintiff was released, he again received a notice ordering him to appear before the Juvenile Court to show cause why he should not be held in contempt.

Mr. Chastain of Memphis Area Legal Services represented Sevier at the second civil contempt hearing which occurred on February 18, 1982.² Since the thirty-day period in which to appeal from the October 2, 1981 contempt order had lapsed, Chastain moved the Juvenile Court, William Ingram presiding to vacate both the contempt order and the original consent order. Ingram denied the motions and issued an arrest warrant.

Sevier then appealed to the Tennessee Court of Appeals via Rule 10 of the Tennessee Rules of Appellate Procedure. This rule empowers Tennessee appellate courts, in their discretion, to hear extraordinary appeals from interlocutory orders of lower Tennessee courts where

2. The record does not indicate how the plaintiff became aware of Mr. Chastain and Memphis Area Legal Services or under what arrangement Mr. Chastain agreed to represent the plaintiff.

the lower courts have "so far departed from the accepted and usual course of judicial proceedings as to require immediate review" The Court of Appeals declined to hear the case through an order which read in its entirety:

The appellant's application for extraordinary appeal under rule 10, T.R.A.P. is denied. Cost in this court is adjudged against the appellant. Enter: March 30, 1982.

Sevier then appealed to the Tennessee Supreme Court, which also refused to hear the case. The court's order read in full:

The Motion to Correct Error in Application for Permission to Appeal filed by the Defendant-Appellant is granted.

The Court has considered the application for permission to appeal filed by the Appellant and the answer of the Appellee, the briefs of counsel and the entire record and is of the opinion that the application should be and the same is hereby denied.

Costs will be borne by the Appellant.

After the Tennessee Supreme Court issued its decision, and while the arrest warrant remained in effect,³ the plaintiff filed his complaint in the district court. In the prayer for relief, Sevier first asked that both the July 1977 consent order and the October 1981 civil contempt order be voided. Second, Sevier requested a declaration that when ordered to appear at future contempt hearings involving failure to pay child support, he is en-

3. The plaintiff has acknowledged that the Juvenile Court subsequently vacated the arrest warrant.

titled to testify, to present evidence, to confront and cross-examine witnesses, and to have the assistance of counsel (including appointed counsel if indigent).⁴ Third, the plaintiff requested an order enjoining the defendants from violating the above enumerated rights. Finally, Sevier requested compensatory damages for lost wages, punitive damages and attorney's fees. The defendants moved to dismiss the complaint. The district court granted the motion as to all defendants under the doctrine of judicial immunity. It is from this judgment that the plaintiff appeals.

II.

The plaintiff's primary claim is that he was entitled to be informed of the right to counsel, and to have counsel appointed if he were indigent, both at the October 1981 civil contempt hearing and during the July 1977 meeting with defendant Justice at which the consent order was signed. Since Sevier was incarcerated for sixteen days as a result of the civil contempt hearing, he was entitled to have the assistance of counsel during that proceeding. See *Lassiter v. Department of Social Services*, 452 U.S. 18, 25-26 (1981); *Martin v. Fellerhoff*, 526 F. Supp. 969 (S.D. Ohio 1981); *Young v. Whitworth*, 522 F. Supp. 759 (S.D. Ohio 1981). As indicated by the

4. Although Sevier alleges indigence in paragraphs 15 and 21 of the complaint, it is unclear whether he claims to have been indigent all of the time or only some of the time during the period covered by the complaint. This uncertainty is unimportant for purposes of this opinion, however. The plaintiff's position is that regardless of whether or not he was indigent, he was entitled to be informed of the right to counsel both when the July 1977 consent order was signed and when the October 1981 civil contempt hearing was held. The plaintiff further claims that he was entitled to be informed of the right to appointed counsel if indigent; the Juvenile Court personnel could not know whether the plaintiff was indigent unless they inquired about the matter.

Supreme Court in *Lassiter*, the relevant question in determining if a defendant is entitled to counsel during this type of contempt proceeding is not whether the proceeding be denominated civil civil or criminal, but rather is whether the court in fact elects to incarcerate the defendant.

Whether the plaintiff was entitled to the assistance of counsel during the meeting with defendant Justice presents a more difficult question. Sevier contends that he signed the consent decree in order to avoid being arrested and prosecuted for willful failure to pay child support. Although the consent order is a civil judgment, the order resulted from a discussion between the plaintiff and defendant Justice about the affidavit of complaint that had been filed under Tennessee Rule of Criminal Procedure 3.

The plaintiff presents two theories to support his claim that he was entitled to the assistance of counsel during his meeting with Justice. First, he argues that in filing the affidavit of complaint, Justice initiated adversary judicial criminal proceedings on behalf of the state within the meaning of *Moore v. Illinois*, 434 U.S. 220, 226-27 (1977); *Kirby v. Illinois*, 406 U.S. 682, 689-90 (1972) (plurality); and *Massiah v. United States*, 377 U.S. 201 (1964). Those cases stand for the proposition that once adversary judicial criminal proceedings have commenced, the sixth amendment right to counsel attaches. Since the affidavit of complaint was filed before Sevier was ordered to meet with Justice, Sevier contends that he was entitled to have counsel present during the meeting.

Although the Supreme Court has not squarely addressed the issue of whether courts should look to federal

or state law in order to determine when a state judicial criminal proceeding has commenced for purposes of *Massiah* and its progeny, language in two Supreme Court opinions nevertheless suggests that state law controls. See *Edwards v. Arizona*, 451 U.S. 477, 480-82 n.7 (1981); *Moore*, 434 U.S. at 228. The Tennessee appellate courts have held that adversary judicial criminal proceedings are initiated when a magistrate issues an arrest warrant based upon information contained in an affidavit of complaint. *State v. Mitchell*, 593 S.W.2d 280, 286-87 (Tenn.), cert. denied, 449 U.S. 845 (1980); *State v. Baker*, 623 S.W.2d 132, 133 (Tenn. App. 1981); *State v. Beal*, 614 S.W.2d 77, 81 (Tenn. App. 1981).⁵ Since no arrest warrant was issued in the present case before the plaintiff met with Justice, Sevier was not entitled to the assistance of counsel under a *Massiah* sixth amendment theory.

The plaintiff's second theory is that defendant Justice, functioning as a prosecutor, subjected him to custodial interrogation in connection with the criminal complaint. Sevier contends, therefore, that he was entitled to counsel in order to protect his fifth amendment privilege against self-incrimination. See *Miranda v. Arizona*, 384 U.S. 436 (1966).

With regard to the "custody" element, this court has held that whether a person is in custody depends upon the totality of the circumstances in the individual's case. See *United States v. Harris*, 611 F.2d 170, 172 (6th Cir. 1979). The Supreme Court has defined custody as a "formal arrest or restraint on freedom of movement of the degree associated with a formal arrest." *California*

5. The information in the affidavit of complaint must be sufficient to establish probable cause before an arrest warrant will issue. See Rule 4 of the Tennessee Rules of Criminal Procedure.

v. Beheler, 103 S. Ct. 3517, 3520 (1983). A "restraint on freedom of movement of the degree associated with a formal arrest" exists where a person has been "deprived of his freedom of action in any significant way." *Id.* at 3519; *Oregon v. Mathiason*, 429 U.S. 492, 494 (1977).

We hold that if the plaintiff's factual allegations are true, then he was in custody under the *Beheler-Mathiason* test. Sevier was informed that he would be arrested if he did not appear before the Juvenile Court. During the meeting with Justice, he was told that he would be arrested before leaving the building if he did not sign the consent order. These alleged facts contrast sharply with those in *Beheler* and *Mathiason* where the defendants voluntarily appeared, were neither placed under arrest nor threatened with arrest, and were free to leave unhindered by the authorities.

We emphasize that whether a person is in custody depends upon the facts of each case. The result may have been different here, for instance, had the plaintiff not alleged that Justice threatened him with arrest both in the letter demanding that he appear and during the ensuing meeting. The Supreme Court has clearly stated that the mere location of an interview and the fact that an investigation has focused upon a particular person, without more, will not support a finding of custody. *Beheler*, 103 S. Ct. at 3519 n.2, 3520. Our holding that the plaintiff has sufficiently alleged that he was in custody is limited to the facts of this case.

The second element that must be alleged under the *Miranda* theory is that the plaintiff underwent interrogation. Any words or actions on the part of defendant Justice that he should have known would be reasonably likely to elicit an incriminating response from Sevier

would constitute interrogation. See *Rhode Island v. Innis*, 446 U.S. 291, 301 (1980). Again assuming the plaintiff's factual allegations to be true, it is possible that Justice's threat to have Sevier arrested was an act that Justice should have known was reasonably likely to elicit an incriminating response under the totality of the circumstances. Although the plaintiff has not alleged in detail what transpired between Justice and himself, we certainly cannot say that it appears beyond doubt that Sevier can prove no set of facts establishing that he was interrogated. See *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957). Consequently, we hold that the plaintiff has adequately alleged that he was subjected to custodial interrogation in connection with a criminal complaint filed by a state official acting in the role of a prosecutor and, therefore, that he was entitled to the assistance of counsel when he met with that official in July 1977. We express no view, of course, on whether the plaintiff will actually be able to prove on remand that he underwent custodial interrogation and was entitled to counsel.

III.

Assuming that the plaintiff's right to counsel was violated, the next inquiry for purposes of Rule 12(b)(6) is what, if any, relief is available. Sevier initially requests that both the 1977 consent order and the 1981 civil contempt order be vacated under 28 U.S.C. § 2254. We hold that habeas corpus relief is unavailable because the plaintiff has not established that he was in custody within the meaning of 28 U.S.C. §§ 2241 and 2254.

Whether a habeas corpus petitioner is in custody for purposes of §§ 2241 and 2254 is determined at the time that the complaint is filed. *Carafas v. LaVallee*, 391 U.S. 234, 238 (1968). Although a petitioner's release from

custody subsequent to the filing of the complaint may render his case moot,⁶ such a release does not affect the custody question. Moreover, the term "custody" is not limited solely to physical confinement. See, e.g., *Spring v. Caldwell*, 692 F.2d 994, 996 (5th Cir. 1982); *Duvallon v. Florida*, 691 F.2d 483, 484 (11th Cir. 1982), cert. denied, 103 S. Ct. 1533 (1983); *United States ex rel. Wojtycha v. Hopkins*, 517 F.2d 420, 423 (3d Cir. 1975). For instance, persons on parole, probation or bail may be in custody for purposes of §§ 2241 and 2254. See, e.g., *Duvallon*, 691 F.2d at 485; *Hopkins*, 517 F.2d at 423-24.

The record reflects that the plaintiff filed his complaint on July 16, 1982. At this time, Sevier was subject (and remains subject) to the 1977 consent order. This civil judgment requiring him to pay child support does not, however, constitute custody. If a fine imposed in a criminal case does not create custody for purposes of §§ 2241 and 2254, see, e.g., *Spring*, 692 F.2d at 996-97 (cases collected), then neither does a civil money judgment.

The record further discloses that Sevier's incarceration resulting from October 1981 civil contempt hearing had ended well before July 16, 1982. Nor was the plaintiff subject to parole, probation, bail or any other indicia of custody pursuant to the October 1981 civil contempt order when the complaint in this case was filed. Since the plaintiff was in custody of neither of the juvenile court orders that he seeks to have vacated as of July 16, 1982, see *Ward v. Huron County Circuit Judge Knoblock*,

6. The issues of custody and mootness are distinct. See, e.g., *Ward v. Huron County Circuit Judge Knoblock*, Nos. 82-1743 & 83-5152 at 8 (6th Cir., filed June 28, 1984); *Malloy v. Purvis*, 681 F.2d 736, 738 n.1 (11th Cir. 1982), cert. denied, 103 S. Ct. 1527 (1983); *Harrison v. State of Indiana*, 597 F.2d 115, 117-18 (7th Cir. 1979).

Nos. 82-1743 & 83-5152 at 6-8 (6th Cir., filed June 28, 1984), this court lacks jurisdiction to grant habeas corpus relief.⁷

IV.

We next consider the plaintiff's claim for injunctive and declaratory relief. The Supreme Court has recently decided that the doctrine of judicial immunity does not protect state judicial officers such as Turner, Person and Justice from suits for injunctive relief. See *Pulliam v. Allen*, 52 U.S.L.W. 4525 (1984). Since the defense of judicial immunity is unavailable to the defendants regarding the declaratory and injunctive relief claims, we proceed to address their argument that this court's opinion in *Parker v. Turner*, 626 F.2d 1 (6th Cir. 1980), requires the federal courts to abstain from granting either declaratory or injunctive relief under the facts of this case.

7. Sevier also argues that on the date that the complaint in this case was filed, he was subject to arrest under the warrant issued by the Juvenile Court on February 18, 1982. He implies that being subject to immediate arrest pursuant to an arrest warrant constitutes custody.

In his prayer for relief, however, the plaintiff did not seek to have the arrest warrant vacated. Moreover, even if being subject to immediate arrest pursuant to an arrest warrant creates a custody situation, a question which we do not reach, that fact would not benefit the plaintiff. If the plaintiff were in custody under the arrest warrant when the complaint was filed, the claim would nevertheless be moot because the arrest warrant has been withdrawn. Sevier has identified no adverse collateral consequences attaching to his former status as the subject of an arrest warrant. He does not contend, for instance, that his having been the subject of an arrest warrant will prevent him from voting, serving as a juror, engaging in certain types of businesses or becoming a union official. See *Carafas*, 391 U.S. at 237. Since the plaintiff has not alleged any possibility that adverse collateral consequences will result from his former status as the subject of an arrest warrant, the arrest warrant claim is moot. See *Sibron v. New York*, 392 U.S. 40, 54-57 (1968).

Like the present case, *Parker* involved Tennessee fathers who had been held in civil contempt for willfully failing to pay child support and who had not been informed of the rights to retained or appointed counsel, to testify, to present evidence and to confront and cross-examine witnesses. Moreover, both cases involved complaints for prospective relief to ensure that certain rights would be afforded in future civil contempt proceedings. Under these circumstances, the *Parker* court held that the federal courts, absent "extraordinary circumstances," must abstain from granting declaratory or injunctive relief because doing so would involve unduly intrusive interference with, and monitoring of, the day-to-day conduct of state hearings and trials. 626 F.2d at 7-8. Since *Parker* is the rule of this circuit, we are required to abstain unless extraordinary circumstances now exist that were not present when *Parker* was decided.

In *Parker*, this court stated:

Should the Tennessee appellate courts be unable or unwilling to correct continuing unconstitutional conduct by the juvenile court judges, plaintiffs would then be in a position of showing "exceptional circumstances" which would warrant federal injunctive [or declaratory] relief.

626 F.2d at 10. The plaintiff alleges two examples of the Tennessee appellate courts' unwillingness to afford constitutional rights to fathers who are required to appear at civil contempt hearings for failure to pay child support. First, in *Davenport v. Jailer, City of Memphis*, 572 S.W.2d 265 (Tenn. App. 1978), the Tennessee Court of Appeals held that fathers who are incarcerated after civil contempt hearings for failure to pay child support need not be informed of the right to counsel prior to the hearing.

Since *Davenport* was decided before *Lassiter*, however, the decision does not demonstrate that the Tennessee appellate courts are unable or unwilling to enforce an established right to counsel possessed by persons like Sevier. Moreover, *Davenport* also was decided before *Parker*. In *Parker*, this court held that the right to appointed counsel in civil contempt proceedings was unsettled. 626 F.2d at 2 n.2. This is further evidence that the Tennessee Court of Appeals did not indicate an unwillingness in *Davenport* to enforce an established right to counsel. Finally, the *Parker* court also was convinced two years after *Davenport* that:

[T]here is no reason to believe that Tennessee's appellate courts would tolerate summary and indiscriminate jailing of indigent fathers. On the contrary, Tennessee's appellate courts have long required that a fair hearing be conducted in contempt cases [Citations omitted.]

626 F.2d at 9. Hence, we conclude that Sevier's reliance upon *Davenport* is misplaced.

Second, the plaintiff argues that the refusal by both the Tennessee Court of Appeals and the Tennessee Supreme Court to hear his Rule 10 extraordinary appeal demonstrates that the Tennessee courts are unwilling to enforce his constitutional rights. This argument is flawed, however, because the Tennessee appellate courts may have declined to hear the extraordinary appeal for procedural reasons rather than on the merits.

Rule 10 of the Tennessee Rules of Appellate Procedure by its terms applies only to interlocutory orders. Although the parties have cited no Tennessee authority, and we have found none, defining what is an interlocutory order for purposes of a Rule 10 extraordinary appeal, the

July 1977 consent order, the October 1981 civil contempt order and the order denying the motions to vacate appear to be final orders rather than interlocutory orders. The parties agree, for instance, that Sevier could have directly appealed both after the civil contempt order was entered and after Judge Ingram denied the motions to vacate, but that he failed to do so. It is extremely unlikely that a direct appeal would have been provided if the civil contempt order and the order denying the motions to vacate were not final orders. Thus, the Tennessee appellate courts may have refused to hear the extraordinary appeal because no interlocutory order was involved.

Furthermore, it is undisputed that Sevier did not appeal to the Circuit Court after the civil contempt order and the order denying the motion to vacate were entered. A Tennessee statute and Tennessee case law clearly provide that an appeal from the Juvenile Court lies to the Circuit Court rather than to the Tennessee Court of Appeals. See Tenn. Code Ann. § 16-10-112; *Doster v. State*, 195 Tenn. 535, 537 (1953); *State v. Bockman*, 139 Tenn. 422 (1917); *State v. Womack*, 591 S.W.2d 437, 441 (Tenn. App. 1979). Consequently, the Tennessee appellate courts may have declined to adjudicate Sevier's extraordinary appeal because those courts did not wish to encourage litigants to circumvent the normal appellate process.

We acknowledge that the orders of the Tennessee appellate courts do not reflect the grounds upon which those courts refused to hear the plaintiff's extraordinary appeal. The plaintiff, however, bears the burden of proving that the state appellate courts have exhibited an unwillingness in this case to enforce his constitutional rights. See *Parker*, 626 F.2d at 10. Sevier has not shown that the Tennessee appellate courts did not rely, or could not have relied, upon the two procedural grounds already

discussed. Since the plaintiff has not demonstrated the presence of "extraordinary circumstances" as that term is defined in *Parker*, the federal courts must abstain from deciding his claims for declaratory and injunctive relief.

V.

The plaintiff's final claim is that he is entitled to damages.⁸ The district court held that the doctrine of judicial immunity precluded any award of damages against the defendants. We disagree and remand the case, subject to our comments in Part VI of this opinion, for further proceedings on the damages claim.

The general rule is that judicial officers are entitled to immunity from suits for damages. See, e.g., *Stump v. Sparkman*, 435 U.S. 349, 355 (1978). Nevertheless, judicial officers may be liable for damages if they act in the "clear absence of all jurisdiction," *id.* at 357, or if they engage in nonjudicial acts. *Id.* at 360. Sevier initially contends that by not informing him of his constitutional rights, Judge Turner and his staff acted in the clear absence of all jurisdiction. The plaintiff relies upon language in *Johnson v. Zerbst*, 304 U.S. 458, 467-68 (1938), to the effect that if a person is entitled to the assistance of counsel and none is provided, then the court lacks jurisdiction to proceed.

This reading of the phrase "clear absence of all jurisdiction" is faulty for two reasons. First, a judicial officer does not act in the clear absence of all jurisdiction if he merely acts in excess of his authority. See *Stump*, 435 U.S. at 356; *Rankin v. Howard*, 633 F.2d 844, 849

8. The parties have also briefed the issue of whether attorney's fees may be recovered from the defendants. Since the plaintiff will be entitled to attorney's fees, if at all, only if he prevails on remand, we decline to address this issue now.

(9th Cir. 1980), *cert. denied sub nom. Zeller v. Rankin*, 451 U.S. 939 (1981). The Supreme Court has held, for instance, that if a judicial officer exceeds his authority in a type of case that he normally has jurisdiction to hear, the officer has not acted in the clear absence of all jurisdiction. *See Stump*, 435 U.S. at 357 n.7; *see also Lopez v. Vanderwater*, 620 F.2d 1229, 1234 (7th Cir.), *cert. dismissed*, 449 U.S. 1028 (1980). Although the defendants in this case may have exceeded their authority in persuading Sevier to sign the consent order and in incarcerating him after the civil contempt hearing without the assistance of counsel, the defendants were empowered to handle Juvenile Court cases. The defendants, therefore, did not act in the clear absence of all jurisdiction.

Second, the Supreme Court has specifically held that the commission of grave procedural errors, including those involving due process, does not constitute judicial action taken in the clear absence of all jurisdiction. *See Stump*, 435 U.S. at 359; *see also Lopez*, 620 F.2d at 1234. Although the defendants may have been guilty of grave procedural error in not informing the plaintiff of his constitutional rights, this mistake does not render them liable for damages.

The plaintiff has adequately alleged, however, that each of the defendants in effect undertook prosecutorial duties that constituted nonjudicial acts. As has been indicated, Sevier contends that pursuant to a contract with Shelby County, Judge Turner is responsible for collecting overdue child support payments. In order to discharge this responsibility, Turner allegedly instructs staff members such as Justice to initiate criminal prosecutions against fathers who are in arrears on their payments. The

impending prosecutions are then used as leverage to extract signatures on consent orders that are approved by Judge Turner without hearings. Furthermore, with the aid of defendant Person, Judge Turner initiates civil contempt proceedings against those fathers who do not remain current on their payments under the consent orders. These fathers are either incarcerated or are required to make purge payments out of which Turner, Person and Justice receive part of their salaries.

We hold that the defendants' involvement in initiating both the criminal prosecution and the civil contempt proceeding against Sevier, if proven, would constitute nonjudicial acts exposing them to liability for resulting damages. The test to be applied is whether initiating accusatory processes such as criminal prosecutions or civil contempt proceedings is a function normally performed by a judicial officer. *Stump*, 435 U.S. at 362. We conclude that it is not. Cf. *In re Murchison*, 349 U.S. 133 (1955) (judge initiates prosecution by acting as one-man grand jury); *Lopez*, 620 F.2d at 1235 (judge selects and prepares the criminal charge and prepares the guilty plea form).⁹

VI.

Defendants Turner and Justice also raise the affirmative defense of the statute of limitations in response to the plaintiff's § 1983 damages claim.¹⁰ The complaint alleges that all acts performed by Turner and Justice

9. We emphasize, however, that if judicial officers engage in both judicial and nonjudicial acts, they may only be held liable for those damages caused by their nonjudicial acts. See *Lopez*, 620 F.2d at 1234-36.

10. The defendants do not argue that the statute of limitations defense applies to the § 1985(3) claim.

in connection with the signing of the consent order occurred in July 1977. The complaint was filed on July 16, 1982. Turner and Justice contend that a one-year statute of limitations bars any § 1983 claim for damages arising from events occurring in July 1977. We agree.

Since § 1983 contains no statute of limitations, this court must refer to the limitations period that applies to the most closely analogous Tennessee action. See *Kilgore v. City of Mansfield, Ohio*, 679 F.2d 632, 633-34 (6th Cir. 1982); *Mason v. Owens-Illinois, Inc.*, 517 F.2d 520, 521 (6th Cir. 1975). The most closely analogous Tennessee action is a civil action "for compensatory or punitive damages, or both, brought under the federal civil rights statutes. . . ." Tenn Code Ann. § 28-3-104. The limitations period for such actions is one year. *Id.* Consequently the plaintiff's § 1983 claim for damages against Turner and Justice for acts occurring in July 1977 is barred by the statute of limitations.

The plaintiff attempts to escape this conclusion by contending that the limitations period did not begin to run until Mr. Chastain informed him in December 1981 that he possessed a federal claim. Since the complaint was filed in July, 1982, Sevier asserts that his claim was timely brought.

This argument is unmeritorious. Although state law provides the statute of limitations to be applied in a § 1983 damages action, federal law governs the question of when that limitations period begins to run. *Perez v. Laredo Junior College*, 706 F.2d 731, 733 (5th Cir. 1983); *Keating v. Carey*, 706 F.2d 377, 382 (2d Cir. 1983); *Gowin v. Altmiller*, 663 F.2d 820, 822 (9th Cir. 1981); *Bireline v. Seagondollar*, 567 F.2d 260, 263 (4th Cir. 1977),

cert. denied, 444 U.S. 842 (1979).¹¹ The statute of limitations commences to run when the plaintiff knows or has reason to know of the injury which is the basis of his action. See *Keating*, 706 F.2d at 382; *Cline v. Brusett*, 661 F.2d 108, 110 (9th Cir. 1981); *Rubin v. O'Koren*, 621 F.2d 114, 116 (5th Cir. 1980); *Bireline*, 567 F.2d at 263. A plaintiff has reason to know of his injury when he should have discovered it through the exercise of reasonable diligence. Cf. *Briley v. State of California*, 564 F.2d 849, 855 (9th Cir. 1977) (due diligence standard applied to discovery of fraudulent misrepresentation or concealment of facts in § 1983 action); *Herm v. Stafford*, 663 F.2d 669, 682 (6th Cir. 1981) (due diligence standard applied to discovery of injury rule in federal securities cases).

Sevier has alleged no misrepresentation or concealment of fact that he could not have become aware of through the exercise of reasonable diligence. Compare *Briley*, 564 F.2d 849. Instead, he simply appears to have been ignorant of the right to counsel and other legal rights. We hold that for purposes of a civil damages claim, the plaintiff had reason to know that his legal rights were being violated when the defendants extracted his signature to the consent order in July 1977. A person exercising reasonable diligence would expeditiously attempt to determine the validity of a legal document signed in response to threats of criminal prosecution and would not wait over four years before initially consulting legal counsel about the matter. To hold that a statute of limitations does not begin to run until a plaintiff happens

11. See also *Fiesel v. Board of Education*, 675 F.2d 522, 524 (2d Cir. 1982); *Cline v. Brusett*, 661 F.2d 108, 110 (9th Cir. 1981); *Rubin v. O'Koren*, 621 F.2d 114, 116 (5th Cir. 1980); *Briley v. State of California*, 564 F.2d 849, 855 (9th Cir. 1977).

to consult counsel would extend the limitations period indefinitely, thereby defeating the purpose of the statute of limitations. Accordingly, we conclude that the limitations period on the claim for damages arising from the events surrounding the signing of the consent order began to run on July 20, 1977 rather than in December 1981.¹²

VII.

The judgment of the district court is **AFFIRMED IN PART, REVERSED IN PART** and **REMANDED** for further proceedings consistent with this opinion.

EDWARDS, Circuit Judge, concurring in part and dissenting in part. I concur in Judge Contie's opinion except for Section IV thereof. As to Section IV, I cannot agree that federal abstention is appropriate in this case. As the majority opinion recognizes, the Supreme Court has recently held that the doctrine of judicial immunity does not bar injunctive relief. *Pulliam v. Allen*, 104 S. Ct. 1970 (1984).

Appellant has, in my view, also alleged "extraordinary circumstances" which, if established at hearing, would involve federal constitutional violations. Among these are failure of the Tennessee judge to advise him of his right to counsel before a hearing which has resulted and could result in his further incarceration. Unlike the plaintiff in *Parker v. Turner*, 626 F.2d 1 (6th Cir. 1980), this appellant did seek the only relief realistically available to him in state appellate court, which denied his claim.

12. This holding does not affect the plaintiff's § 1983 claim for damages against Turner and Person in connection with events occurring in October 1981 and thereafter.

The federal court exists to protect individual citizens' rights under the federal constitution and laws as this court held in a case involving juvenile detention, *Hanna v. Toner*, 630 F.2d 442 (6th Cir. 1980), *cert. denied*, 450 U.S. 919 (1981).

The federal courts were created to vindicate the constitution and laws of the United States, *Bivens v. Six Unknown Named Agents*, 403 U.S. 388, 91 S.Ct. 1999, 29 L.Ed.2d 619 (1971); *Bell v. Hood*, 327 U.S. 678, 684, 66 S.Ct. 773, 777, 90 L.Ed. 939 (1946); *Marbury v. Madison*, 1 Cranch 137, 163, 177, 2 L.Ed. 60 (1803). The rule, of course, is that their doors are open to complaints of violation of such laws. Exceptions to that rule are few and narrowly drawn. *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 813, 96 S.Ct. 1236, 1244, 47 L.Ed.2d 483 (1975); *County of Allegheny v. Frank Mashuda Co.*, 360 U.S. 185, 188-89, 79 S.Ct. 1060, 1062-1063, 3 L.Ed.2d 1163 (1959).

OCT 31 1984

ALEXANDER L. STEVAS,
CLERK

No. 84-116

In the Supreme Court of the United States**October Term, 1984****JOHN L. VAKAS, M.D.,**
Petitioner,

VS.

PAUL RODRIQUEZ, M.D., WILLIAM C. SWISHER,
M.D., FREDERICK J. GOOD, D.C., BETTY JO McNETT,
JOAN MARSHALL, D.C., JULIA BARBEE, D.O., HER-
MAN H. JONES, JR., M.D., F. LEE DOCTOR, D.O.,
JERRY L. JUMPER, D.O., JAMES A. McCLURE, M.D.,
DON L. McKELVEY, D.C., GORDON E. MAXWELL,
M.D., HAROLD L. SAUDER, D.P.M., JAMES D. BRUNO,
M.D., RICHARD J. CUMMINGS, M.D., F. J. FARMER,
D.O., HELEN GILLES, M.D., DAN A. KELLY, M.D.,
RICHARD A. UHLIG, D.O., JAMES R. CROY, D.C., REX
A. WRIGHT, D.C., THE STATE OF KANSAS, and THE
KANSAS STATE BOARD OF HEALING ARTS,
Respondents.

**REPLY OF PETITIONER
TO THE BRIEF IN OPPOSITION TO
PETITION FOR WRIT OF CERTIORARI**

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**REPLY OF PETITIONER
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**I. RESPONDENTS IMPROPERLY ALLEGE
FACTS AND DEFENSES THAT ARE IMMATE-
RIAL TO THIS COURT'S REVIEW OF THE
SUMMARY DISMISSAL OF PETITIONER'S
CLAIMS IN THE TRIAL COURT BELOW.**

Respondents' brief contains a dozen pages of self-serving and largely unsubstantiated allegations in a so-called "Statement of Case." Respondents shamelessly seek

to garner the sympathies of the Court by describing petitioner as an object of an investigation by the State Board for abuse of prescription practices. Respondents fail to state, however, the final result of that investigation. All charges against Petitioner were dismissed as being factually baseless, following the filing of petitioner's action in federal court.

Indeed, the lengthy recitation by respondents of their fruitless investigation is irrelevant to the issues before this Court. Respondents must know that this Court will not provide *de novo* review nor allow respondents to engage in a manipulation of the extremely limited record developed in the trial court.

To the contrary, it is axiomatic that review of any summary dismissal by a trial court necessitates that the claims of plaintiff be taken as true and in the light most favorable to plaintiff. This same rule was recently reaffirmed by the Fifth Circuit in circumstances similar to this case.

Because we consider a Rule 12 dismissal, our record is slim and our standard generous: we may affirm only if it appears beyond doubt that [plaintiff] can prove no set of facts in support of his claim that would entitle him to relief.

Bishop v. State Bar of Texas, 736 F.2d 292, 295 (5th Cir. 1984) (citing *Conely v. Gibson*, 355 U.S. 41, 45-6 (1957) and *Jones v. United States*, 729 F.2d 326, 330 (5th Cir. 1984)).

Indeed, respondents' version of the facts is particularly inconsequential in this case, as the trial court did not grant the motion to dismiss because of any factual insufficiency as to petitioner's claim, rather the dismissal was based upon the trial court's finding that the Board and its members

were entitled to full judicial immunity and that federal courts should abstain from such controversies as a matter of law.

II. RESPONDENTS' ASSERTION THAT THE FEDERAL DISTRICT COURT WAS WITHOUT SUBJECT MATTER JURISDICTION OVER PETITIONER'S CLAIMS IS WITHOUT MERIT.

Respondents' first argument in response to the petition is that the Federal District Court lacked subject matter jurisdiction over this controversy. Respondents' Brief at p. 14. This same hapless argument was briefed by respondents in the Tenth Circuit below, but the court of appeals did not even mention the point in its decision.

Quite simply, this argument has nothing whatsoever to do with the issues before this Court. Respondents merely attempt to muddy the waters by attempting somehow to analogize the so-called "Theard Doctrine" to this case.

The Theard Doctrine was developed from a trio of decisions from this Court in 1957. *Theard v. United States*, 354 U.S. 278 (1957); *Schware v. Board of Bar Examiners of New Mexico*, 353 U.S. 232 (1957); *Konigsberg v. State Bar of California*, 353 U.S. 252 (1957). This doctrine simply states that Federal District Courts do not have jurisdiction to review the decisions of a state's supreme court concerning the denial or revocation of bar licenses. This rule is designed to promote comity between the state and federal system so that a Federal District Court will not sit in review of a discretionary decision of the state's highest court. Rather, appeal must be directly to the United States Supreme Court.

Respondents offer a puzzling extrapolation of the Theard Doctrine to argue that the State Board of Healing Arts deserves the same deference as the Kansas Supreme

Court. This ill-conceived notion was not even addressed by the Tenth Circuit, and is plainly unsupportable in law and in logic. To hold that no federal subject matter jurisdiction exists over a state board and its members would be tantamount to granting the board a sort of "super-immunity," nullifying the clear dictates of this court in such cases as *Stump v. Sparkman*, 435 U.S. 349 (1978), *Butz v. Economou*, 438 U.S. 478 (1978), and *United States v. Lee*, 106 U.S. 196 (1882) ("No officer of the law may set that law at defiance with impunity.")

Certiorari should be granted by this Court in order to defuse the state's hopes of constructing for itself this sort of "super-immunity."

III. RESPONDENTS ERRONEOUSLY IDENTIFY THE ELEVENTH AMENDMENT JURISDICTIONAL BAR AS AN ISSUE IN THIS CASE, WHILE IGNORING THE TRUE ISSUE CONCERNING PETITIONER'S DIRECT RIGHT OF ACTION UNDER THE FOURTEENTH AMENDMENT.

Respondents write in detail about the eleventh amendment prohibition against suits naming a state as a defendant. This is not an issue, however, as Petitioner has conceded from the beginning that his damage claim under 42 U.S.C. § 1983 is so barred. The State of Kansas is named as a defendant only as to Petitioner's claim under the fourteenth amendment as authorizing a direct right of action under the egregious circumstances presented in this case. Because this action arises directly under the fourteenth amendment, the immunity afforded states by the eleventh amendment does not apply. *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971).

Respondents ignore the true issue before this Court by offering the bare conclusion that the fourteenth amendment claim is a "non-issue." Respondents' unwillingness to face the issue should not deter this Court from addressing this important question which was slighted by the Tenth Circuit's decision below. *Vakas v. Rodriguez*, 728 F.2d 1293, 1296 (10th Cir. 1984).

IV. RESPONDENTS' ANALYSIS OF THE STANDARD OF IMMUNITY THAT SHOULD BE APPLIED TO THE STATE BOARD IS SIMPLY A RESTATEMENT OF THE FAULTY REASONING DEVELOPED BY THE TENTH CIRCUIT.

Respondents ask this Court to refuse to correct the aberrant standard for judicial immunity developed by the Court below: if a "facial review" of the statutes under which a state administrative agency operates reveals that the agency has a single function that resembles a quasi-judicial activity, then the agency automatically gains full judicial immunity for whatever actions it takes, whether or not such activity bears any relationship to the applicable statutes. See *Vakas*, 728 F.2d at 1296-7.

The concept of reviewing the enacting statutes of an agency instead of the agency's activity itself to determine the appropriate standard for immunity has absolutely no precedent in this Court or any other circuit. The writ should be granted to rectify the Tenth Circuit's misconception of the appropriate method to determine the proper measure of immunity for state administrative agencies.

Even if respondents could properly claim general quasi-judicial immunity for its normal operations based upon a facial review of the board's underlying state statutes, such immunity would be dissolved in this instance because the board's actions against petitioner were "in clear absence

of all jurisdiction.” *Stump v. Sparkman*, 435 U.S. 349, 357 (1978). Respondents’ actions against petitioner began with vexatious efforts to unjustifiably subject petitioner to the state power wielded by the board, and ended with personal self-protecting attempts by individual members of the board to use their power to extort a release from petitioner in order to shield them from the consequences of their abuses. Respondents blithely assume that *Stump* was intended to countenance such affirmative violations of a physician’s civil rights. This Court should set them straight.

A purely personal abuse of state power by board members to coerce petitioner’s signature on a release of claims certainly does not qualify as being within the jurisdiction of the board. The board was not concerned with its responsibility to the healing arts profession in Kansas. Rather, the Board members were engaged in a desperate attempt to deflect the consequences of their unlawful proceedings against the petitioner. They abused their public office toward that end by threatening reinstitution of the same baseless charges unless petitioner would sign the release. A judicial entity that wrongfully engages in a prosecutorial action designed to make possible a violation of an individual’s civil rights, with the use of state power, loses all immunity for such action. *Lopez v. Vanderwater*, 620 F.2d 1229, 1236 (7th Cir. 1980).

V. RESPONDENTS’ ARGUMENT ON THE ISSUE OF ABSTENTION INCORRECTLY APPLIES THE HOLDING IN MIDDLESEX TO THIS CASE.

In *Middlesex County Ethics Committee v. Garden State Bar Association*, 457 U.S. 423 (1982), this Court held that the abstention doctrine of *Younger v. Harris*, 401 U.S. 37 (1971) applied to attorney disciplinary proceedings be-

cause such proceedings contained sufficiently important state interests. Federal courts, therefore, should defer to state courts where attorneys have ample opportunity to raise their constitutional claims.

The trial court below relied heavily on *Middlesex* in dismissing petitioner's claims. The Tenth Circuit, however, gave only a passing comment concerning the *Middlesex* decision, noting:

The principles of comity and federalism dictate that federal courts *abstain from premature entry* into state judicial construction of administrative disciplinary procedures.

Vakas 728 F.2d at 1297 (citing *Middlesex*) (Emphasis added).

The court's reference to abstention from "premature entry" into state proceedings is an apparent recognition of the qualification contained in *Middlesex*, that bad faith or repeated harassment by the state will justify federal intervention. 457 U.S. at 436.

Petitioner in this case resorted to the federal courts only after having undertaken the state appeal process from the state board's proceedings and thereafter being exposed to renewed threats of further prosecution by the board. Nothing in the *Middlesex* holding requires a litigant to forever weather harassment from the state system while attempting to press constitutional claims.

Although Texas disciplinary proceedings are capable of deciding constitutional challenges to specific procedures, recourse in those proceedings is not a sufficient avenue to remedy the constitutional injury done by bad faith proceedings themselves. The right under *Shaw* [*v. Garrison*, 467 F.2d 113 (5th Cir.), cert. denied, 409

U.S. 1024 (1972)] is to be free of bad faith charges and proceedings, not to endure them until their speciousness is eventually recognized.

Bishop v. State Bar of Texas, 736 F.2d 292, 294 (5th Cir. 1984) (Emphasis added).

The Tenth Circuit erred by categorizing petitioner's claims as "premature." Federal intervention was compelled by the board's harassing threats to renew proceedings unless petitioner would submit to signing away his claims through a release.

CONCLUSION

For all the foregoing reasons, a writ of certiorari should issue to review the judgment and opinion of the Tenth Circuit Court of Appeals.

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